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In the Supreme Court of the United States

No.

October Term, 1982

HON. WANDA P. CHOCALLO, Administrative Law Judge,

Petitioner

v.

RUTH PROKOP, Chair; ERSA POSTON, Vice-Chair; MERIT SYSTEMS PROTECTION BOARD; UNITED STATES OF AMERICA; JAMES CARTER, PRESIDENT; PATRICIA HARRIS, Secretary, Department of Health, Education and Welfare; ANDREW J. YOUNG, Associate Commissioner, Office of Hearings and Appeals, Social Security Administration, U. S. Dept. of Health, Education and Welfare; ROBERT L. TRACHTENBERG, Department of Health, Education and Welfare,

Respondents

PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND FOR A WRIT OF CERTIORARI TO THAT COURT BEFORE JUDGMENT

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QUESTIONS PRESENTED

1. Whether petitioner, an Administrative Law Judge appointed by the Secretary of HEW to adjudicate Social Security cases as his direct delegate, who was not charged with any offense known to law, is absolutely immune from a removal action under Section 7521 of the Administrative Procedure Act, 5 USC §7521, based on the faithful discharge of her judicial obligations according to her own understanding and conscience and in disregard of pressures and threats.

2. Whether the constructive discharge by respondents, Office of Hearings and Appeals and the Merit Systems Protection Board, of petitioner as a permanent Administrative Law Judge is void for lack of jurisdiction and authority and for violating the doctrine of absolute judicial immunity, the Administrative Procedure and Social Security Acts, Article I, Sections 8 and 9, Article II, Section 4, and the First, Fifth, Sixth, Eighth and Ninth Amendments to the Constitution of the United States.

3. Whether Section 7521 of the Administrative Procedure Act, 5 USC §7521, as well as Civil Service Commission implementing regulations 5 CFR §930.214 et seq., is repugnant to the Constitution and void inasmuch as it constitutes a pure delegation of legislative power, is constitutionally vague in violation of the Fifth Amendment and is barred by the constitutional prohibitions against bills of attainder and *ex post facto* laws.

4. Whether petitioner, who was appointed by a head of a department under Article II, Section 2, is a civil

officer who can only be removed by impeachment for and conviction of treason, bribery or other high crimes and misdemeanors pursuant to Article II, Section 4 of the Constitution of the United States.

5. Whether it was improper for the Court below to refuse to consider respondents' discrimination and motivation where the record shows and petitioner alleged respondents singled her out and retaliated because petitioner alertly and affirmatively responded to expansionist aggressions that obstructed justice and encroached on judicial independence by petitioning Congress for an investigation and the District Court, Eastern Dist. of Pa., for appropriate redress.

6. Whether Social Security Administrative Law Judges, like other judges, have the right to move forward with administrative proceedings and conduct their judicial functions free from interruption, intimidation or harassment and free from pressures, the control and coercive influences, either direct or indirect, of parties, executive, legislative and other officials and partisan interests.

7. Whether Appeals Council orders of June 9, 1977 and November 2, 1977 in the Pearl Taylor case, and HEW regulations authorizing appeals council, a non-statutory body in the Office of Hearings and Appeals, to adjudicate Social Security cases and to review the findings and final decisions issued by the Secretary after hearing, violate the Administrative Procedure and Social Security Acts and the Fifth Amendment to the Constitution and are invalid.

8. Whether the Courts below acted improperly by "filling in the blanks" to vest respondents OHA and

MSPB, who did not file an answer, with presumptive absolute immunity to shield them from liability for damages to petitioner for their failure to observe the clear limitations on their powers.

9. Whether respondent, President of the United States, who is mandated by Article II, Section 1 of the Constitution to see that the laws are faithfully executed, has a mandatory duty to have expelled from government those respondents named and other named and unnamed public officials for having breached their constitutional and statutory oath, the Code of Ethics for Government Service, 5 USC §7301, and for obstructing the due course of justice.

10. Whether the Court below acted improperly by denying summary judgment for petitioner as a matter of law and entering summary judgment for respondents.

11. Whether the district court acted improperly in dismissing petitioner's complaint as to respondents OHA and MSPB on the ground of absolute immunity and as to all respondents on the ground the complaint is vague under Rule 8, F.R.C.P.

12. Whether the Courts below, who like other departments, are bound by the Constitution, have been unfaithful to their judicial oath for failing and refusing to pass on the constitutional and legal questions raised by petitioner so as to mandate their supervision and censorship by this Court and necessitate their ultimate removal from office to protect the public and each citizen's interest in the fair and impartial administration of the Social Security and

other laws, to insure the integrity of our system of justice, and to restore confidence in our institutions and in the ability and willingness of our Courts to administer the same justice to high officials as would normally apply to other wrongdoers.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WANDA P. CHOCALLO,

Petitioner

v.

RUTH PROKOFF et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Wanda P. Chocallo, Petitioner, petitions for a writ of certiorari to review the per curiam judgment of the United States Court of Appeals for the District of Columbia Circuit rendered on February 11, 1982 affirming in part and remanding the case for proceedings consistent therewith.

Petitioner also petitions this Court for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit to review the decision of the district court entered after remand on May 5, 1982, which was appealed by petitioner to the Circuit Court on June 1, 1982 (No. 82-1607).

OPINIONS BELOW

The court of appeals opinion was ordered not to be printed (App. 3a). The district court's opinion is not reported (App. 13a). The district court's opinion after remand is not reported (App. 7a). The order of the Merit Systems Protection Board is reprinted in the Appendix (54a).

JURISDICTION

The per curiam judgment of the court of appeals was entered on February 11, 1982. A timely petition for rehearing with a suggestion for rehearing en banc was denied on April 8, 1982 (App. 1a). The judgment of the district court on remand was filed May 5, 1982 and an appeal filed on June 1, 1982 (No. 82-1607). The jurisdiction of this Court is invoked under 28 USC 1254(1) and 2101(e).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved, which are set forth in Appendix 67a, infra, are:

Constitution of the United States:

Article I, Section 8; Article I, Section 9; Article II, Section 2; Article II, Section 4; Amendment I; Amendment V; Amendment VI; Amendment VIII.

Statutes of the United States:

5 USC 551; 5 USC 556; 5 USC 554 (d); 5 USC 559; 5 USC 706; 5 USC 3105; 5 USC 7521; 42 USC 405 (b) (g) (h).

Regulations:

5 CFR 930.202 (a); 5 CFR 930.203; 5 CFR 930.214; 5 CFR 930.221; 20 CFR 404.941; 20 CFR 404.947a.

STATEMENT OF THE CASE

This case presents for review the Circuit Court's affirmation of the denial of summary judgment for petitioner as a matter of law; entry of summary judgment for respondents without answer, affidavits and hearing; dismissal of the complaint as to Trachtenberg, Young, Prokop and Poston, without answer, on the ground of presumptive absolute immunity; remand for district court to furnish reasons for dismissal; and the District Court's dismissal of the Complaint for vagueness under F.R.C.P., Rule 8.

Petitioner filed a complaint against respondents, government officials, setting forth several causes of action. She requests reinstatment as a permanent Administrative Law Judge appointed by the Secretary of HEW and assigned to the Philadelphia field office, Office of Hearings and Appeals (OHA), Social Security Administration (SSA), U. S. Department of Health and Human Services (HHS), with back pay, accrued benefits and damages. The office formerly was known as the Bureau of Hearings and Appeals (BHA), SSA, U. S. Department of Health,

Education and Welfare (HEW). She asks a Merit Systems Protection Board (MSPB) (formerly CSC) administrative order be declared void as contrary to her statutory and constitutional rights, powers, privileges, protections and due process of law, and be expunged from her records. She seeks substantial damages for vast invasions of her statutory and constitutional civil rights by respondents for failing to observe obvious statutory and constitutional limitations on their powers. She requests Section 7521 of the Administrative Procedure Act be declared unconstitutional.

Petitioner also seeks a mandatory injunction directing the President of the United States, who has a constitutional duty to see that laws are faithfully executed, to have expelled from government respondents and other named and unnamed officials for breach of their public trust and the Cod. of Conduct for Government Employees.

The U. S. Department of Justice, Attorney General's office, by *ex parte* communication directed the United States Marshall *not* to serve the writ of summons and complaint issued by the District Court upon respondent President of the United States. This was done in violation of 28 USC §569(b) and 42 USC 1990 and without petitioner's knowledge and consent. No motion to quash was filed in behalf of the President.

Petitioner alleges respondents Trachtenberg, Director, BHA and MSPB, conspired to deprive petitioner of her office as ALJ in order to cover up obstructions of justice and in retaliation for opposing and exposing obstructions of justice and fraud in the John C. Coleman and Pearl Taylor cases and other unlawful BHA practices. She further alleges respondent, BHA, in violation of her Fourth Amendment rights, broke into her locked office, burglarized it, stole her personal property and ransacked her office in an

effort to secure incriminating evidence in a case before her, viz., claimant Pearl Taylor. BHA, in conspiracy with Community Legal Services, Inc., of Philadelphia (CLS), and in conspiracy with CSC, invaded her privacy by covertly soliciting and inducing complaints against her from lawyers and others; asking her staff to spy on her; contacting former employers to induce adverse comments; conducting secret probes and surveillances; spreading false and vicious rumors about her in furtherance of a secret removal drive. BHA also unlawfully infringed upon her decisional independence, harassed and threatened her with investigation and removal from office during the course of administrative proceedings. BHA unlawfully refused to process a promotion due petitioner by operation of law; altered and falsified payroll and leave records; issued false personnel and payroll certification documents; confiscated her salary check; refused to furnish her with competent and adequate staff; assigned cases selectively to her; singled her out for special review of her decisions for the purpose of manufacturing evidence to effectuate petitioner's removal.

Petitioner maintains she is still an Administrative Law Judge. She has not been impeached as required by Article II, Section 4 of the United States Constitution and convicted of "treason, bribery, or other high crimes and misdemeanors." She has not been removed by the Secretary under Section 7521 of the Administrative Procedure Act, 5 USC §7521. At noon on March 26, 1980, she was constructively discharged by being evicted from her office, without any warning and without official notice. She was told by BHA management to vacate by 5:00 p.m. Subsequently, the locks on the outer office doors were changed to bar petitioner's entry. No removal action was ever filed by the Secretary, the "agency" as defined by the APA,

by which petitioner is employed. An ultra vires removal action was filed by Trachtenberg, Director, BHA, without statutory authority. His reasons are set forth in his affidavit of September 27, 1977, quoted below (A. 226):

> "Based primarily on ALJ Chocallo's *action in the Taylor case, I decided to file a letter of charges against her. I* had been *dissatisfied with her conduct in the Coleman* (Mr. 'Doe') case and *generally displeased* with her *attitude.* It was, however, her conduct in barring Mrs. Taylor's attorney from further representation without due process and her defiance of the Appeals Council's Order which *finally prompted me to take this action. I considered both acts to be gross abuses of discretion and in contravention of the law and regulations."* (Emphasis supplied.)

Respondents, in their appellate brief, stated:

> "Ms. Chocallo's removal came about because she refused to recognize the lawful hierarchy within the Social Security Administration."

Former Social Security Commissioner James Cardwell, in his April 2, 1976 response to Congress concerning petitioner's February 29, 1976 request for a congressional inquiry into BHA's obstructions of justice in the John C. Coleman case and other unlawful practices, stated (A. 113):

> *"The concept of supervision without interference in the exercise of an ALJ's judgment seems to be the issue.* I would note that *both Mr. Trachtenberg and I support the need for ALJ's to accept supervision in this sense.* Beyond that, I do not think I should comment further in light of the plan for the Bureau of Hearings and Appeals to take the matter to the Civil

Service Commission." (Underscoring [italics] supplied.)

A distinction should be made *in limine* between the two agencies involved here. BHA is the "agency" whose cases are adjudicated by ALJ's. Its office manager is the Director. The Secretary of HEW is the employing "agency", within the meaning of the APA, vested with the right to hire and fire ALJ's, to whom he directly delegates his discretionary adjudicatory powers, and whom he assigns to BHA.

The uncontradicted key facts in the voluminous record (which also are alleged with particularity in the complaint) are as follows: Petitioner, Wanda P. Chocallo, was appointed by the Secretary of HEW on July 24, 1974, as a hearing examiner under Section 1631 (d) (2) of the Social Security Act due to her qualifications as a lawyer with over 25 years experience, international lecturer, former law clerk to a Chief Supreme Court Justice of the State of Pennsylvania, and a subject of *The World Who's Who of Women*. She was a scholarship and honor student who worked her way through the University of Pennsylvania and Temple University School of Law. She completed a 4 year evening law course in 2 1/2 years while working full time.

Petitioner experienced opposition to her appointment at the outset. She was the sole SSI examiner assigned to the Philadelphia SSI office, and in addition for almost a year heard all Delaware and Harrisburg SSI cases. She also was assigned 40 Baltimore cases. Petitioner was denied an established office and full complement of staff, etc. Washington, D.C., with a minimal case load, was provided a full established office with 3 hearing examiners, 4 hearing assistants and 3 secretaries. In less than 1 year, she had to move to 3 different locations.

Trachtenberg was appointed Director, BHA, in 1975 by Commissioner Cardwell to destroy the autonomy of ALJ's by fiat. He served at Cardwell's pleasure. He had no supervisory authority over ALJ's. He also acted as Chairman of Appeals Council, a non-statutory body vested authority by departmental regulations inconsistent with the Social Security Act and the APA. He appointed appeals council members and staff, who served at his pleasure. Trachtenberg immediately undertook to issue mandatory, unlawful instructions regarding every detail of an ALJ's role under the guise of "administrative management." He encouraged his administrators in charge to assume a supervisory role over ALJ's.

Petitioner, on February 29, 1976, petitioned the Secretary, Congress, the President and others to investigate the detailed and documented charges presented and to initiate appropriate remedial action and asked MSPB to investigate.

On July 1, 1977, she filed an unprecedented lawsuit against Trachtenberg, Cardwell, other Bureau officials, Stein, Bernstein et al. and Community Legal Services, Inc. of Philadelphia in the District Court, Eastern District of Pennsylvania. She sought monetary damages and to enjoin the unlawful practices that chilled the ALJ's independence.

On July 9, 1977, petitioner received a letter dated July 5, 1977 from MSPB stating Trachtenberg filed a "letter of charges" proposing her removal as a Temporary Administrative Law Judge. In June, 1979, petitioner requested MSPB issue a subpoena on the Regional Chief Administrative Law Judge, a defendant in her suit, who informed petitioner Trachtenberg filed the removal action because petitioner sued him.

Plaintiff's lawsuit gave rise to other similar actions filed by other ALJ's. Suits also were filed by claimants

who charged Trachtenberg's practices rendered the hearing process unfair and denied their rights to a fair and impartial hearing. At taxpayers' expense, special counsel Burton Berkley was hired to defend Trachtenberg in these and other suits filed against him.

By Act of Congress all SSI hearing examiners were converted to temporary ALJ's for a term expiring December 31, 1978, effective April 11, 1977, and were deemed to have been appointed under Section 3105 of the APA. Trachtenberg, as a reprisal, unlawfully refused to process petitioner's appointment for over 6 months though he had no discretion in the matter. In January 1978, by further Act of Congress, all temporary ALJ's were given permanent status.

The complaint filed by Trachtenberg contains 3 charges. *Charge I* alleges petitioner violated a lawful order of Appeals Council of June 9, 1977 in the Pearl Taylor case by holding a hearing on June 13, 1977. The order [which was not directed to petitioner and which was unauthorized and denounced by Taylor] purported to accomplish 4 ultra vires things simultaneously: (1) vacate petitioner's interlocutory order; (2) remove the case to AC for hearing; (3) remand the case to the Acting Regional Chief Administrative Law Judge and (4) order him to reassign the case to another ALJ. *Charge II* alleges petitioner failed to relinquish the Taylor case files when asked to do so. *Charge III* states petitioner demonstrated a lack of judicial temperament that caused Appeals Council to remand three cases (Coleman, Howard and Taylor) to another ALJ because of allegedly unfair hearings. The Howard and Coleman cases were heard by petitioner while she was a hearing examiner appointed under the Social Security Act. They were heard April 2, 1975 and Decem-

ber 29, 1975, respectively. All claimants were represented by CLS.

Petitioner, after a thorough study of the record and upon hearing testimony, ascertained that claimant Coleman while working was collecting supplemental security income. His CLS attorney, Linda Bernstein, thereafter began to interrupt the proceedings, to instruct claimant not to answer the judge's questions, flouted petitioner's rulings and was generally obstructive. After the hearing, Bernstein met with agency officials and attempts were made to obtain the case files from petitioner and force her out of the case. The ARCALJ threatened to have petitioner investigated and fired for refusing to discuss the Coleman case dehors the record. Petitioner reported the threats and coercive influences to Trachtenberg, who threatened her with insubordination. He ordered her to cooperate with the ARCALJ and Bernstein; that it was her duty to do so; that she misunderstood the hearing process. He also attacked her "productivity."

Bernstein flouted and ignored 3 supplementary hearing notices and subpoenas served on her and Coleman. She demanded an immediate decision. BHA assured her, even before petitioner's decision was filed, that it would be reviewed by appeals council. Petitioner, under the law, then had to develop the record from collateral sources. She discovered Coleman received SSI payments under 3 social security numbers. Bernstein knew this. Yet, she demanded increased payments for him claiming spurious exclusions. Based on the data obtained from collateral sources, petitioner ordered Coleman to repay about $3000 fraudulently obtained.

In Taylor's case (heard February 15, 1977), her CLS attorneys tried to force a change of judge without claimant's knowledge and consent. Chief CLS attorney Stein

filed a motion to disqualify petitioner. Such motions may be granted or denied by the presiding judge and are not interlocutorily reviewable. Taylor, when told of the motion by petitioner, repudiated it and her CLS representatives. She accused Stein of "misusing and abusing her" for their own "dirty work" and "ambition". She branded the motion "stoned politics." She said she did not want Stein to represent her. She wanted the hearing postponed so she could bring in her minister to get to the bottom of things. She said "black folks have been pushed around, mistreated, shoved around and done in" that CLS "makes a rag mop out of you" "they throw you from one place to another" "to confuse your mind" that "they ought to be ashamed of themselves." She said she didn't know why she had been suddenly transferred in September 1976 from the neighborhood office, which represented her and where she always went, to Stein at the main CLS office. Petitioner discussed the motion to disqualify with Taylor. Taylor asked that it be dismissed. Claimant during the hearing decided to obtain other counsel and asked for a continuance. She did not wish CLS to represent her any longer. A formal order was issued by petitioner on May 10, 1977 dismissing the motion and excluding Stein from further participation in the case. Stein, though discharged by Taylor and excluded from the case, wrote a series of *ex parte* letters to various agency officials, in which he unauthorizedly held himself out as Taylor's lawyer. He assailed petitioner's character and competency and demanded her removal from the case and from office. Taylor knew nothing about these letters. At her request, a further hearing was set for June 13, 1977. In the interim, several attempts were made by BHA to obtain the Taylor files from petitioner's staff. On June 9, 1977, an appeals council order was issued by Trachtenberg's subordinates without

Taylor's knowledge. At the hearing she denounced BHA and the order. She said they had no right to think for her and to deny her her rights. She testified CLS threatened her that if she appeared at the hearing she would go down in defeat. They admitted to her the order was part of a conspiracy to remove petitioner from office. They told her it was a battle and she would have to choose sides. She said she did not authorize nor request a change of judge and would proceed with petitioner. She stated "that's the way they rule people today" "insisting on what you have to do", that "they refused to recognize what I told them."

Taylor stated ARCALJ Gitman met with her and Stein prior to the February 15th hearing. Gitman told her petitioner denied 15 similar cases because she was anti-black, anti-poor and anti those with nervous disorders. He promised she would be paid benefits if she helped get evidence to remove petitioner. BHA subsequently broke into petitioner's locked office, burglarized her files to steal the Taylor tapes and records and removed petitioner's personal property.

REASONS FOR GRANTING THE WRIT

I.

This case is unprecedented. Petitioner is the first judge in the annals of American jurisprudence removed from office for refusing to submit to official pressures. Chief Justice Burger has shown interest in these very issues by appointing a committee to take affirmative measures to protect the independence of the judiciary.

Petitioner constructively lost her position without equal protection and due process. She was never removed by the Secretary nor impeached. She was never charged with any offense known to law. Nor did she violate the law or do anything to warrant such action.

Petitioner in her assigned Philadelphia BHA office environment, when deciding Social Security cases, was placed under undue pressure and intimidation by agency officials and other improper parties. She desires to be afforded the right to resume her office in BHA and to perform her duties with the protection of *Butz v. Economou,* 438 U.S. 478 (1978), as an "independent" ALJ as required by the APA "free from the control and coercive influences, either direct or indirect of the executive, legislative or politics" "free from pressures by the parties or other officials within the agency." She wishes to insure the rights of claimants coming before her to fair and impartial hearings. Other judges are being coerced. They will become subordinates and not independent decision-makers. Petitioner submits this Court should review this case because the Court below ignored the body of law developed by this Court. If the decisions of the Circuit and District Courts are permitted to stand, the criteria developed by precedents

of this Court since *Marbury v. Madison*, 1 Cranch 437 (1803) will, by default, be drained of meaning.

"One policy consideration pervades this case, the public interest requires decisions and action to enforce laws for the protection of the public and its citizens." *Schuerer v. Rhodes*, 416 U.S. 232, 40 L.Ed. 2d 90. The imperative public importance not only justifies review by this Court but a deviation from normal appellate practice so that inseparable issues may be resolved at once. This Court stated in *Butz:* "Adjudications have a serious impact on private and public rights and must be conducted by independent ALJ's as required by the APA. The due process and equal protection clause is, moreover, the only security guaranteed each citizen."

The integrity of the Court, which is one of the nation's choice traditions, cannot be maintained if an ALJ qualified to sit by all moral and ethical standards, allows herself to be driven from sitting in judgment on a case and also from office. It is, therefore, of vital national concern that the important constitutional issues raised be adjudicated by this Court.

BHA and MSPB recognized the limitations upon their power over the ALJ's decision-making process. The position description issued to ALJ's, approved by MSPB, states ALJ's possess "full and complete individual independence of action and decision . . . without review (and) full responsibility and authority for the conduct of hearings and the disposition of cases." "The Social Security and Administrative Procedure Act," the description continues, "prohibit substantive review and supervision of the (ALJ) in the performance of his quasi-judicial functions. His decisions may not be reviewed before publication, and after publication only by the appeals council in certain prescribed circumstances. He is subject only to such admin-

istrative supervision as may be required in the course of general office management." (A. 52-55) An Attorney General Opinion to the Secretary of Interior dated January 18, 1977, ruled, after consulting with MSPB, an ALJ's jurisdiction over a case ends after an appeal is filed from his decision and an ALJ cannot be disciplined for discharging adjudicatory functions according to his conscience and understanding. He noted MSPB is the agency charged with supervision of the ALJ program by Congress and "has been looked to by the courts to prevent any devious practice subersive of the proper independence of ALJ's."

This Court held in *Wong Yang Sung v. McGrath*, 339 U.S. 33, that courts cannot stand aside and rubber stamp their affirmance of decisions that are repugnant to the Constitution and inconsistent with statutory mandate or that frustrate the congressional policy underlying a statute. That is precisely what the courts below did here. They condoned and contributed to respondents' usurpation of sweeping dictorial powers, by summarily and perfunctorily stripping a judge of her office, her livelihood and reputation without examining the record and interpreting and applying the law to the actual facts of record. The APA, 5 USC 706 (2) mandates an independent assessment of a citizen's claim of violations of First, Fifth and other constitutional rights when reveiwing agency decision-making. Whether a party sues directly under the Constitution or, instead, asks a federal court to set aside the agency action as contrary to her constitutional rights under 706 (2) (B) of the APA, the role of the district court is the same. *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579; *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Porter v. Califano*, 597 F.2d 770 (5 Cir., 1979). The District Court should have predicated its crucial First, Fifth and Eighth Amendment judgment on its own assessment of the record. Instead, it wrongly deferred

to the agency determination by granting the government's summary judgment motion without answer, affidavits and hearing.

The Court below did not apply the controlling tests to this case. Avoidance was resorted to as an avenue of escape from the paramount authority of the Federal Constitution. The material mistakes of law are apparent on the face of the record. Justice David Davis said, in speaking for this Court in *Ex parte Milligan*, 4 Wall 2:

> *"No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended* during any of the great exigencies of government. *Such a doctrine leads directly to anarchy or despotism. . . .* Our fathers knew that *unlimited power was especially hazardous to freemen."* (Emphasis supplied.)

Chief Justice Burger declared in *Schuerer v. Rhodes*, supra: "Public officials, whether governors * * * or judges, who fail to make decisions when they are needed * * * do not faithfully perform the duties of their office." And in *United States v. Nixon*, 418 U.S. 683 (1974), he said: "Many decisions of the Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison, 1 Cranch 137 (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Chief Justice Marshall in *Marbury*, denominated those judges who fail to apply and interpret the law as "immoral" "worse than solemn mockery" and "equally a crime."

By statute and regulations, respondents BHA and MSPB had no right to hire, discharge or interfere in the employment of an employee such as petitioner. 5 USC 551; 3105; 7521; 5 CFR 930.202 et seq.; 42 USC 405 (1); Section 1631 (2) (d) of the SSA. These powers were entrusted

by Congress to the Secretary of HEW, the "agency" within the meaning of 5 USC 551 and 5 CFR 930.202. The power to hire and fire is non-delegable. 5 USC 559. Once the Secretary makes a valid delegation of his adjudicatory powers to an ALJ, he, himself, as the "agency" cannot divest the ALJ of jurisdiction. Jurisdiction can only be reasserted by amending the regulations containing the delegation. *United States v. Nixon*, 418 U.S. 683 (1974); *Accardi v. Shaugnessy*, 347 U.S. 260 (1954).

Petitioner's jurisdiction in the Taylor case could not be terminated by the ultra vires Appeals Council order issued at Trachtenberg's direction. MSPB and the courts are charged with a knowledge of the law. They impeached a faithful judge because, allegedly, she disobeyed a "lawful" order of Appeals Council. Yet they would not rule on the validity of the order. It was petitioner's duty to interpret and apply the law to Appeals Council's order. She made her decision with absolute disregard of anticipated personal consequences. The courts failed to faithfully execute their obligation.

Other statutory provisions as well barred respondents BHA and MSPB from doing what they did. 5 USC 7521 (1979 pocket part); 42 USC 405(h) and 18 USC 1505. The APA, SSA and 18 USC 1505 prohibited respondents from reviewing petitioner's decisions. The Social Security Act, 42 USC 405(h), forbids *"any person, agency or tribunal"*, except the district court under 405(g), from reviewing the findings and decision of the Secretary issued after hearing, which is final and binding on all parties. This Court held review of such decisions cannot be obtained under the APA, the Mandamus Act or any other vehicle. *Califano v. Sandors*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed. 2d 192 (1977). Also it is a well recognized rule that the integrity of the judicial process is best preserved by recog-

nizing that judges, as independt decision-makers, have no obligation to defend themselves in reviewing courts.

The Court below gave an ironic twist to the law. It sustained Trachtenberg's fatally defective complaint, which petitioner challenged, while dismissing petioner's detailed complaint on the ground it is vague. This is a classic case of one law for Athens and another for Rome. The threshold question of jurisdiction, moreover, was totally disregarded. The jurisdictional essentials necessary to the validity of every judgment were lacking. They are, jurisdiction of parties, jurisdiction of the subject matter and power or authority to decide the particular matters presented and the lack of either is fatal to the judgment. The fact that an indispensable party, viz., the Secretary, was lacking alone was fatal. *U. S. v. United States F. & G. Co.*, 369 U.S. 506. Under the circumstances of this case, it is clear that summary judgment should have been entered for petitioner as a matter of law. The use made of the summary judgment statute was a perversion of justice and abuse of it.

The agency action was also barred by the doctrines of constitutional statutory and common law judicial immunity which petitioner invoked *ab initio*. Petitioner's judicial acts were protected by common law judicial immunity. Judges will be subject to liability only when they acted in the clear absence of all jurisdiction. *Butz*, supra. Immunity is an affirmative defense and must be pleaded in a responsive pleading. No responsive pleadings were filed by respondents. While the district and circuit courts ignored petitioner's properly pleaded defenses of absolute judicial immunity, they assumed the role of triers of fact to confer presumptive absolute immunity upon Trachtenberg, Young, Prokop and Poston to shield them from liability. Trachtenberg and Young were ministerial officers who ignored the clear statutory limitations on their powers. Prokop and

Poston clearly were absent subject matter and party jurisdiction. What they did was expressly forbidden by law. The gratuitous vestiture of immunity upon them by the circuit court *sua sponte* cannot be sustained under *Butz*. Additionally, respondents were engaged in criminal conduct proscribed by 18 USC 1505 which barred immunity. The removal action was filed during the pendency of the Taylor case. It impeded and obstructed the due course of justice. This Court declared in *O'Shea v. Littleton*, 414 U.S. 502, 94 S.Ct. 669 (1974):

> "We have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880). On the contrary, *the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress.'* "

The Circuit and District Courts' actions cannot be supported by law.

The court likewise would not rule on petitioner's claim that the agency action is void because it is barred by Article II, Sec. 4 of the Constitution. Petitioner who was appointed by the head of a department qualifies as a civil officer within the purview of Article II, Sec. 4. *U. S. v. Germaine*, 99 U.S. 483; *U. S. v. Mouat*, 124 U.S. 303; *Buckley v. Valeo*, 424 U.S. 1. Impeachment for and conviction of treason, bribery or other high crimes and misdemeanors, as provided under Article II, Sec. 4, is the only method by which petitioner could be removed from office. Any other removal of an ALJ appointed by the Secretary constitutes a bill of attainder.

The Court failed to rule on the constitutionality of Section 7521 of the APA challenged by petitioner. It was

obliged to do so. *Blair v. U.S.*, 250 U.S. 273. The statute is a pure delegation of legislative power and must be declared void. Congress failed to lay down policies and establish standards. *Wichita R. & L. Co. v. Pub. Utilities Com.*, 260 U.S. 48. It is also void for vagueness. It necessitates so much guesswork as to its coverage as to incur the condemnation of the Fifth Amendment. *Giacco v. Pennsylvania*, 382 U.S. 399; *Anti-Fascist Committee v. McGrath*, 341 U.S. 123; *Ricks v. Dist. of Columbia*, 414 F.2d 1097 (1968).

The agency action violates the prohibitions against *ex post facto laws* contained in Article I, Sec. 9 and is void. Acts punished must by law of the land be forbidden when done. *Chambers v. Florida*, 309 U.S. 227 (1940); *Cummings v. Missouri*, 71 U.S. 277.

The action is retaliatory and discriminatory as evidenced by the record. The Court failed to apply the tests required by law. Petitioner's constitutionally protected conduct was a motivating factor in Trachtenberg's decision to have her removed. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Petitioner's decisions were singled out for special review at Trachtenberg's direction. None of the almost 1000 decisions issued by her had been remanded by the district court. No adverse actions were filed against ALJ's whose decisions had been remanded by the courts and appeals council, and who failed to comply with appeals council's orders directed to them personally. It is patent petitioner was denied the equal protections of the law.

Findings

The agency action likewise is ineffective inasmuch as it failed to make express findings of fact and conclusions based upon the evidence as required by 5 USC §557(c)

and to show the ruling on each finding, conclusion, exception and omission presented by petitioner. The lack of express findings et al. cannot be supplied by implication or by reference. *Panama Refining Co. v. Ryan,* 293 U.S. 388; *Butz v. Economou,* supra. Nor is the action supported by substantial evidence.

Petitioner's request for mandamus relief against the President has been totally ignored. Those who frustrate the law undermine the Constitution and individual rights, and provide uncurbed and unprincipled leadership, must be punished and held accountable. For the responsible American citizen to remain silent is cowardice and a grievous injustice to the proposition that in America the law is supreme.

II

The District Court on remand dismissed petitioner's complaint stating it is "vague" and does not conform to FRCP, Rule 8. The complaint facially does not lack detail. Mere vagueness or lack of detail is not a ground for a motion to dismiss. The proper method of attack is a motion for a more definite statement. *Clus v. Brooklyn Eastern Terminal,* N.Y., 359 U.S. 231, 79 S.Ct. 760 (1959); *Ybarro v. City of San Jose,* CA Cal., 503 F.2d 1041 (1974).

III

The courts below did not deal with these serious considerations that strike at the heart of the independence of judges and their and their fellow citizens' inalienable rights. What occurred here does not lend to principled and fearless decision-making but tends to the scandal and subversion of justice.

There is not one shred of evidence in this entire record to show petitioner has been guilty of some violation of law which, if legally proved, would justify her impeachment or removal from office. And petitioner is entitled to every presumption of innocence until and unless such a violation is charged and proved in a proceeding in which she, like respondents and other judges and citizens, is accorded the protection of the safeguards guaranteed by the requirements of equal and due process of law. The respect for a rule of law administered through the equal and due process of law is the hallmark of judges without which they cannot keep faith with their profession. Taking away a woman's right to hold judicial office is imposing a penalty as severe as a criminal sanction, perhaps more so. Those in government who must carry the burden of guilt, should carry the burden of proof.

The practices disclosed by this record are forbidden by law. The exalted powers of government were used to punish manufactured crime dictatorially because petitioner pursued measures to preserve the impartiality and integrity of the administration of justice under the Social Security laws. MSPB and the courts below, bent on petitioner's defeat, employed distortions, misrepresentations and falsehoods.

The specter of improper relationship between OHA, CLS and MSPB hovers throughout this record. Trachtenberg, through his subordinates, aided CLS attorney Bernstein in suppressing and abetting fraud and frustrating the ends of justice in the Coleman case. Significantly, Bernstein openly brags she was recently appointed an ALJ because she helped Trachtenberg get rid of petitioner. Trachtenberg aided CLS attorney Stein, who was fired and condemned by Pearl Taylor in obstructing justice in the Taylor case. The courts below ignored not only the actual facts of

record but the statutorily and constitutionally defined immunities protecting petitioner's conduct. To protect the wrongdoers, they fashioned judicial phrases, known as common law absolute immunity, that do not appear anywhere in the Constitution because the framers of that document designed it to protect the citizens against tyrants in government and not vice versa.

To tolerate CLS counsel's flouting the rulings of a presiding tribunal, the judicial process would degenerate to whatever might be the personal whims of counsel on a particular day. One might as well have counsel wear the robes, ascend the bench and then make irrevocable rulings while the trial judge patiently awaits the command of counsel. The only parties to the Coleman and Taylor proceedings were claimants and the public, both of whose interests petitioner, acting in behalf of the Secretary, had a dual responsibility to safeguard. CLS, Trachtenberg as Chairman of Appeals Council, and his subordinates were not parties to those proceedings. None of them had legal authority to do what they did.

It is common knowledge that public officials, counsel and courts are bound by the law and must fastidiously observe limitations on their powers. They are required to follow congressional mandates whether explicit or ascertainable as inherent in underlying policy. This precludes them from giving effect to their own notions as to what is wise, just or politic with respect to proceedings within the jurisdiction of an ALJ. The present record reflects a pervasive pattern of evasions and violations of the law. It is unreasonable to assume respondents merely mistakenly concluded that the circumstances as conceived by them warranted the particular actions taken by them. On the contrary, they deliberately failed to observe the obvious

statutory limitations imposed upon their power and authority.

The obligation of a judge to safeguard public and private rights with equal protection under the law does not permit a timorous reluctance to take whatever action is warranted by the circumstances of a case even when such action must be directed towards high ranking officials within the same or coordinate branches of federal government. Judges must not be obsequious toadies in their attitudes toward recreant high ranking officials. Servile judges contaminate impartiality and weak characters ought not to be judges. The people depend upon courageous and independent judges for decisions and judicial conduct that will insure society as a whole and its individuals against those who would undermine and destroy the orderly and impartial course of justice. The administration of justice ought not to be made unduly difficult by irresponsible acts of public officials, lawyers and courts. To allow what occurred here to go unnoticed and uncensored would encourage and perpetuate unlimited harassment and intimidation of the most conscientious judge. It seriously disrupts, hinders and obstructs the orderly, untrammeled and impartial administration of justice and abrogates the rights and dignity of the trial judge, which must be as scrupulously guarded and maintained by the judiciary as the rights and independence of litigants and lawyers. *Ex parte Secombe*, 60 U.S. 9.

To reiterate, there is ample precedent for effective action by a judge to protect his or her independence. Chief Justice Burger's Committee on the Judicial Branch must not represent mere lip service and aggrandizement of power. In an interview by U. S. News World Report, Inc. on December 19, 1977, Chief Justice Burger pertinently commented with respect to a bill proposed by Senator Sam

Nunn for a commission to review charges of misbehavior by a judge that "it must be used with great caution and alertness *never to impinge on the decisional independence of federal judges.*" He said to subject federal judges to a suggested reconfirmation proceedings at certain intervals *"would strike at the very heart of the independence of federal judges."* Federal Judge Irving F. Kaufman aptly stated in *Maintaining Judicial Independence: A Mandate to Judges,* 66 ABAJ 470 (1980) *"while the preservation of judicial independence is a clear mandate to every judge"*, it *"can no longer be entrusted to the ad hoc initiatives of individual judges, lawyers or scholars."*

Like Lech Walesa, whose Polish heritage petitioner shares, her commitment to freedom and opposition to tyranny has never been stronger. To a Pole, wherever born, the Polish sense of freedom, honor and humor cannot be destroyed by force, money or slander. Our ancestors had to persevere through the lifetime of several generations. Petitioner unabashedly admits she is so dedicated that she fights her own battles out of the conviction that if she is going to change things then she would have to win that change in the courts. The brutal Nazi oppressor, Hitler, who declared himself the depositary of all judicial power in Germany, was taught the ages-old lesson that "though wrong may triumph for a season the gravitation of eternal justice is towards the throne of God", and any Nation which does not plumb its practices with that gravitational line must perish.

The goal of our legal system is that each party shall have his or her case, criminal and civil, adjudicated by an *impartial* tribunal. Petitioner's conduct was above reproach and warrants no apology. At the risk of her job and reputation, she administered thorough, painstaking and impartial justice to claimants and the public alike. Respon-

dents and the courts below just do not measure up to what every citizen has the right to expect from those given the special privilege of administering justice. Their interest in impartiality is pure sophistry. It is only fair that the moral in one of Aesop's famous fables, which were used for political purposes when the reign of tyrants in Greece made unveiled speech dangerous, be invoked here; viz., "The Two Crabs", which teaches: *"Example is the best precept."*

CONCLUSION

For the reasons stated above, the petitions for certiorari and for certiorari before judgment should be granted.

Respectfully submitted,
WANDA P. CHOCALLO
Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 80-2518 September Term, 1981
Civil Action No. 80-01053

Wanda P. Chocallo,
Appellant

v.

Ruth Prokop, Chair and Ersa Poston, Merit Systems Protection Board, et al.

Argued 1-26-82

Before Edwards, Circuit Judge, McGowan, Senior Circuit Judge and Oscar H. Davis*, Judge, United States Court of Claims

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ORDER

On consideration of appellant's petition for rehearing filed March 15, 1982, and appellees' petition for rehearing filed, March 25, 1982, it is

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* Sitting by designation pursuant to Title 28 U.S.C. §293(a).

Order Denying Rehearing

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk

BY: (s) Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals for the
District of Columbia Circuit

Filed Apr. 8, 1982

George A. Fisher
Clerk

Judgment, Court of Appeals

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 80-2518 September Term, 1981

Wanda P. Chocallo, Appellant

v.

Ruth Prokop, Chair, Merit Systems Protection Board, *et al.*, Respondents

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United States Court of Appeals for the District of Columbia Circuit

Filed Feb. 11, 1982

George A. Fisher
Clerk

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 80-1053).

Before Edwards, *Circuit Judge*, McGowan, *Senior Circuit Judge*, and Oscar H. Davis, *Judge**

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* Of the United States Court of Claims, sitting by designation pursuant to 28 U.S.C. §293(a).

Judgment, Court of Appeals

JUDGMENT

This cause came to be heard on appeal from an order of the District Court granting the Government defendants' motion for summary judgment, denying the plaintiff-appellant's motion for summary judgment and dismissing the complaint. The court has fully considered the briefs and oral arguments presented by the parties. There is no need for an opinion. *See* D.C. Cir. R. 13 (c).

The court is in agreement with the District Court that the decision of the Merit Systems Protection Board, adopting in full the findings of fact and recommended decision of Administrative Law Judge John J. McCarthy, is supported by substantial evidence and is neither arbitrary nor capricious. ALJ McCarthy's decision is a careful and thorough analysis of the charges brought against the plaintiff. It fully supports the MSPB decision to remove ALJ Chocallo for defiance of lawful orders of the Social Security Administration Appeals Council, for refusal to relinquish Social Security Administration case files, and for clear and demonstrated bias and lack of judicial temperament during claim proceedings at which she presided. *See Wanda P. Chocallo,* 2 M.S.P.B. 20 (1980), *aff'g Wanda P. Chocallo,* 2 M.S.P.B. 23 (1978) (McCarthy, ALJ).

The court, however, notes that the District Court failed to enunciate the basis for its dismissal of plaintiff's constitutional tort claims against the individual Government defendants. With a single exception, we are unable on appeal to "fill in the blanks" in the District Court's memorandum opinion and therefore must remand the case to the District Court for it to explain its dismissal of these claims. The exception relates to the immunity of MSPB

members Prokop and Poston and of Health and Human Services officials Trachtenberg and Young. To the extent that the plaintiff's prolix complaint alleges that Trachtenberg's filing and Young's pursuance of administrative charges under 5 U.S.C. §7521 and Prokop's and Poston's decision for the MSPB violated her constitutional rights, the dismissal was clearly proper. In *Butz v. Economou*, 438 U.S. 478, 508-17 (1978), the Supreme Court held that agency officials who commence and prosecute administrative proceedings are absolutely immune from suit based on those actions and that those who preside at administrative proceedings are absolutely immune from suit based on the decisions that they render.

The Government has suggested a number of other reasons why dismissal of plaintiff's constitutional tort claims may have been appropriate—lack of personal jurisdiction, further claims of official immunity and insufficient pleading. *See* Brief for Appellees at 26, n.10; Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, Record, entry 4. While there may be substantial merit in the Government's contentions, the vague and often conclusory allegations in plaintiff's twenty-six page complaint make it impossible or inappropriate for this court to address the remaining claims raised by appellant. Accordingly, we will leave it to the District Court on remand to consider and express whether these or any other bases for dismissal are availing to the defendants. *See Ostrer v. Aronwald*, 567 F.2d 551 (2d Cir. 1977) (per curiam); *Burns v. Spiller*, 4 F.R.D. 299 (D.D.C. 1945), *aff'd per curiam*, 161 F.2d 377 (D.C. Cir.), *cert. denied*, 332 U.S. 792 (1947); *but see Beranek v. Post-*

master General, 19 Fed. R. Serv. 2d (Callaghan) 1460 (D.C. Cir. 1975) (per curiam).

For the foregoing reasons, it is ORDERED and ADJUDGED by this court that the decision of the District Court affirming the Merit Systems Protection Board's removal of plaintiff Chocallo is affirmed; it is FURTHER ORDERED that, excluding the single exception noted above, the District Court's dismissal of the remainder of the complaint is vacated and the cause remanded to the District Court for proceedings consistent with this opinion.

Per Curiam

FOR THE COURT:

(s) George A. Fisher

George A. Fisher,

Clerk

Memorandum Opinion, May 3, 1982

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1053

Wanda P. Chocallo

Plaintiff

v.

Ruth Prokop, Chair, Merit Systems Protection Board, et al.

Defendants

Filed May 3, 1982

Clerk, U. S. District Court

District of Columbia

MEMORANDUM OPINION

This case is before the Court on remand from the Court of Appeals. Plaintiff was terminated from her position as an administrative law judge for Health and Human Services (HHS) on March 20, 1980 by order of the Merit Systems Protection Board (MSPB). She brought suit in the District Court claiming, *inter alia*, that the MSPB decision was arbitrary and capricious; that certain

officials of the MSPB and HHS, namely, MSPB members Prokop and Poston and HHS officials Trachtenberg and Young, had committed constitutional torts under the First, Fifth and Eighth Amendments; and that Secretary Patricia Harris and President Jimmy Carter were culpable for their failure to investigate this matter. This Court dismissed the case on October 10, 1980 finding that there was substantial evidence to support plaintiff's termination. The Court of Appeals in *Chocallo v. Prokop*, C. A. No. 80-2518 (D.C. Cir., Feb. 11, 1982) affirmed this dismissal, except as to some of the claims of constitutional torts. Regarding the constitutional tort claims, the Court of Appeals specifically held that to the extent plaintiff alleged that "Trachtenberg's filing and Young's pursuance of administrative charges under 5 USC §7521 and Prokop's and Poston's decision for the MSPB violated her constitutional rights, the dismissal was clearly proper . . . [A]gency officials who commence and prosecute administrative proceedings are absolutely immune from suit based on those actions and [officials] who preside at administrative proceedings are absolutely immune from suit based on the decisions that they render." The Court reversed and remanded the case for explanation of the bases for the dismissal of the rest of the constitutional tort claims.

Defendants have argued that these constitutional tort claims should be dismissed for failure to meet the pleading requirements of Federal Rule of Civil Procedure 8. FRCP 8(a) requires that a complaint contain a "short and plain statement of the claim showing the pleader is entitled to relief." FRCP 8(f) states that courts must construe pleadings "so as to do substantial justice." The law also requires that conclusory, vague, or general allega-

tions regarding constitutional facts must be dismissed. *Ostrer v. Aronwald*, 567 F.2d 551 (2d Cir. 1977). "Insubstantial lawsuits . . . should not survive a motion to dismiss . . . firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz v. Economou*, 438 U.S. 478, 507-08 (1978).

Plaintiff's allegations of constitutional torts are dispersed throughout a prolix, 26-page complaint. While plaintiff alleges violations of her First, Fifth and Eighth Amendment rights, she draws no discernable connections between these claims and the facts she pleads. For example, she makes such statements as "Trachtenberg undertook a 'smear' campaign against plaintiff and assembled a 'dirt' file" (Complaint, ¶15); that Trachtenberg solicited adverse comments about plaintiff from her former employer and spread rumors among the appeals council personnel that plaintiff was "crazy, anti-black, anti-alcohol, anti-poor and pro-Rizzo" (*Id.*, ¶15); that "the entire proceeding represents unlawful discriminatory selective prosecution and persecution against her, based upon sex and upon her free exercise of first amendment privileges as to speech and association" (*Id.*, ¶43); that her removal was caused by her "courage and determination to resist pressures exerted by irresponsible demagogic administrators" (*Id.*, ¶40); and that Young and Trachtenberg issued orders illegally removing cases from plaintiff's jurisdiction "thus perpetuating the corrupt and illegal practices rampant within the agency." (*Id.*, ¶48).

The Complaint does not reveal what acts the four individually named defendants allegedly undertook that violated plaintiff's constitutional rights. Such total failure to

comply with requirements of notice pleading leads the Court to dismiss plaintiff's remaining constitutional tort claims. Because of the severe nature of a dismissal action and the judicial desire to act on the merits of a case, rather than on technicalities, plaintiff's First and Fifth Amendment tort claims are dismissed without prejudice.[1] *DeWitt v. Pail,* 366 F.2d 682 (9th Cir. 1966); Wright & Miller, Federal Practice and Procedure: Civil §1217. The Court can imagine no set of conceivable facts, however, which would support plaintiff's Eighth Amendment tort claim. Accordingly, that claim is dismissed with prejudice.

An appropriate order is attached.

(s) June L. Green
June L. Green
U. S. District Judge

April 30, 1982

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[1] The Court notes that plaintiff was terminated on March 20, 1980. Under 28 USC §2401(a) she therefore has six years to bring her constitutional tort allegations. Accordingly, plaintiff may refile a proper complaint if she desires to do so.

Memorandum Opinion, May 3, 1982
Order

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1053

Wanda P. Chocallo

Plaintiff

v.

Ruth Prokop, Chair, Merit Systems Protection Board, et al.

Defendants

Filed May 3, 1982

Clerk, U. S. District Court

District of Columbia

ORDER

Upon consideration of the opinion of the Court of Appeals in *Chocallo v. Prokop,* C. A. No. 80-2518 (D.C. Cir., Feb. 11, 1982) and the entire record in this case, for the reasons stated in the accompanying memorandum opinion, it is by the Court this 30th day of April 1982,

ORDERED that plaintiff's claims of constitutional torts under the First and Fifth Amendments are dismissed without prejudice; and it is further

Memorandum Opinion, May 3, 1982
Order

ORDERED that plaintiff's claim of constitutional tort under the Eighth Amendment is dismissed with prejudice.

(s) June L. Green
June L. Green
U. S. District Judge

Memorandum Opinion, Oct. 10, 1980

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1053

Jury Trial Demanded

Wanda P. Chocallo,

Plaintiff

v.

Ruth Prokop et al.,

Defendants

Filed Oct. 10, 1980

James F. Davey, Clerk

MEMORANDUM OPINION

This matter is before the Court on Defendants' motion to dismiss and for summary judgment, and plaintiff's motion for summary judgment. The Court has considered the motions, the memoranda of points and authorities in support thereof, all papers in opposition thereto filed by plaintiff and defendants, and the entire record herein, and concludes that defendants' motion must be granted, and plaintiff's motion be denied.

Memorandum Opinion, Oct. 10, 1980

On March 20, 1980, Wanda Chocallo, an administrative law judge, GS-15, employed in the Bureau of Hearings and Appeals of the Social Security Administration, Department of Health, Education and Welfare, was removed from office by order of the Merit Systems Protection Board (MSPB).

The basis for removal concerned plaintiff's treatment of several cases of SSI claimants, particularly the case of Pearl Taylor, Social Security Account Number 201-22-5316. During a hearing on February 15, 1977, in Pearl Taylor's case, claimant's lawyers moved to disqualify Judge Chocallo. Plaintiff then quizzed the claimant on confidential communications with her attorneys over the attorneys' objections, told the claimant of allegedly unsavory character and practices of her attorney and finally dismissed the attorneys from the case. Upon the request of the claimant's representative to the Chief Administrative Law Judge, the case was ordered removed by the Appeals Council of the Social Security Administration from plaintiff's jurisdiction pursuant to 20 C.F.R. §416.1459, to the Council's jurisdiction for reassignment. The plaintiff refused to obey the Appeals Council's order and would not relinquish the case files. To obtain plaintiff's compliance with the Appeals Council's order, the United States, on behalf of the agency, brought a mandamus action. United States of America v. Wanda P. Chocallo (E.D. Pa., Civil Action No. 77-2437). Judge Chocallo convened a hearing in the Taylor case nevertheless, and decided the eligibility claim of Ms. Taylor. After she completed this hearing, she did surrender the case files and thus mooted the mandamus suit.

Memorandum Opinion, Oct. 10, 1980

The Office of Hearings and Appeals of the Social Security Administration sought plaintiff's removal on June 20, 1977. Its Letter of Charges made three claims: (1) the defiance of an Appeals Council's order, (2) refusal to relinquish a case file when requested to do so, and (3) a lack of judicial temperament. The first two related to the Pearl Taylor case and the third to the said case and two other hearings before the plaintiff.

The Letter of Charges was served on the plaintiff and the matter was referred, pursuant to 5 U.S.C. §7521, to the Civil Service Commission for decision and hearing. John J. McCarthy the administrative law judge designated by the Civil Service Commission to hear the case, conducted full evidentiary hearings, and he issued his Recommended Decision on December 5, 1978. His recommendation was that all three charges be sustained, and that each constituted good cause for her removal.

On January 8, 1979, plaintiff sought further administrative review before the MSPB. Oral argument was held on September 11, 1979, at which time plaintiff, an attorney, appeared on her own behalf. On March 20, 1980, the MSPB issued a Memorandum Opinion and Order, affirming the Recommended Decision and causing plaintiff's removal.

This Court's inquiry is limited to a review of the MSPB's decision to remove plaintiff from her position. Contrary to plaintiff's claim, the MSPB has the authority to remove an administrative law judge on the finding of good cause pursuant to 5 U.S.C. §7521. Judicial independence is required to shield against improper outside influence which might compromise the judicial process. However, an administrative law judge is not immune from re-

view for procedural misconduct, incompetence or other failings in the performance of his or her duties.

The standard of review which the Court applies to the MSPB's decision is a narrow one; there is no *de novo* determination by the Court. "Federal judges do not sit as ombudsmen for government employment relations, nor do we . . . substitut[e] our own judgment *ad libitum* for that of the agency." *Doe v. Hampton*, 566 F.2d 265, 271 (1977); *Gueory v. Hampton*, 510 F.2d 1222, 1225 (1974). The Court inquires only whether the agency decision is supported by substantial evidence, is not arbitrary or capricious, and was reached in substantial compliance with procedural requirements.

5 U.S.C. §7521 requires the added protection of a hearing by the agency in order to remove an administrative law judge from office. This additional safeguard broadens the standard of review by requiring this Court to determine if the MSPB's decision was supported by substantial evidence, in addition to applying the two typically applicable standards stated above. *Doe v. Hampton* at 271, fn 15.

Applying this standard the Court concludes that the MSPB's decision must be upheld. As described above, plaintiff, among other injudicious actions, defied a valid order from the Appeals Council by conducting a hearing after the Council had divested her of jurisdiction in the case. She failed also to relinquish the case files. These actions constitute significant abuses of the procedure of the judicial system. Accordingly, this court finds that the MSPB's decision to remove plaintiff is supported by substantial evidence and that the MSPB did not act arbitrarily and capricously.

Further, the MSPB substantially complied with the procedural requirements for removal. As is set out above, plaintiff was given sufficient notice, hearings and opportunities to argue her case before the administrative law judge and the MSPB.

Accordingly, defendants' motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and this case is hereby dismissed. An appropriate order is entered herewith.

June L. Green
U. S. District Judge

Dated: October 10, 1980

ORDER

Upon consideration of plaintiff's motion for summary judgment and defendants' motion for summary judgment, it is by the Court this 10th day of October 1980,

ORDERED that plaintiff's motion for summary judgment is denied; it is further

ORDERED that defendants' motion for summary judgment is hereby granted; and it is further

ORDERED that the instant action is dismissed.

June L. Green
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1053

Jury Trial Demanded

Wanda P. Chocallo,

Appellant

v.

Ruth Prokop, Ersa Poston, Merit Systems Protection Board, United States of America, James Carter, President, Patricia Harris, Secretary, Department of Health, Education and Welfare, Andrew J. Young, Associate Commissioner, Office of Hearings and Appeals, SSA, HEW, Robert L. Trachtenberg, Department of Health, Education and Welfare

Appellees

COMPLAINT

Wanda P. Chocallo
Pro Se
308 Maple Avenue
Drexel Hill, Pa. 19026

COMPLAINT

Plaintiff, Wanda P. Chocallo, respectfully alleges:

1. Plaintiff is an adult female citizen of the United States of America and resides at 308 Maple Avenue, Drexel Hill, Pennsylvania 19026. She is an attorney and, until wrongfully dismissed for being an outspoken critic of government corruption, was employed as an Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration, HEW at 1528 Walnut St., Philadelphia, Pa.

2. This action arises under the Administrative Procedure Act, 5 USC 7521, prior to the amendments thereto in the Civil Service Reform Act of 1978, PL 95-454, Oct. 1378 and the court has jurisdiction under 5 USC 702 et seq., 28 USC 1331 and 1361, as in effect at the time the administrative action was commenced "Savings provision" of the Civil Service Reform Act of 1978, §902 (b); the First, Fifth and Eighth Amendments to the United States Constitution; 5 USC 702 et seq.; the Civil Rights Act, 28 USC 1343, 42 USC 1983 and 28 USC 1343; 28 USC 1343; 28 USC 1331; 28 USC 1361; 28 USC 2201-2.

3. Defendants Ruth Prokop, Chairwoman, and Ersa H. Poston, Vice-Chair, Merit Systems Protection Board, 1717 "H" Street, N.W., Washington, D.C. are sued individually and in their official capacity as successors in office of the Commissioners of the Civil Service Commission and are subject to the jurisdiction of this court pursuant to 5 USC 702 and 28 USC 1331, 1361. Defendant James Carter is sued in his official capacity as President

of the United States. Defendant Patricia Harris is sued in her official capacity of Secretary HEW. Andrew J. Young, Associate Commissioner, Office of Hearings and Appeals, SSA, HEW is sued officially and individually. Robert L. Trachtenberg, HEW is sued officially and individually.

4. On March 26, 1980, at about noon, plaintiff, without any prior notice or warning, was unceremoniously advised by agency officials that she was fired and must vacate her office and remove her furniture, paintings, books, equipment, etc. by 5:00 P.M. that day. She was handed what purported to be a photostatic copy of a personnel notification, which on its face was undiscernable and undecipherable. She was told the MSPB issued a decision removing her from office (of which she had not yet received); had no knowledge and that the agency knew two weeks in advance of the Board's decision.

5. By order received by plaintiff by certified mail on April 7, 1980, the MSPB adopted the recommended decision of ALJ McCarthy that she be removed from her office of permanent administrative law judge, GS-15.

6. On July 22, 1974, plaintiff was appointed a hearing examiner, OHA (formerly Bureau of Hearings and Appeals), SSA, HEW, under Title XVI of the Social Security Act. Because of the sex discrimination prevalent with the agency and because of plaintiff's extensive trial and appellate court experience, HEW's Federal Women's Program Coordinator requested her to apply and serve as a "guinea pig" or "test case." At the time, plaintiff was Chairlady of the Political Subcommittee of the Women's Rights Committee of the Philadelphia Bar Association, an

Assistant City Solicitor for the City of Philadelphia under Mayor Rizzo, and a private practitioner. Despite efforts to block her appointment (including the agency's failure to notify her of the time and place for the written demonstration), she was appointed solely on the basis of her qualifications. She was the only female of the 81 administrative law judges in Region III, encompassing seven states. Among her qualifications are the following:

(a) She was a private general, trial and appellate court practitioner for over 25 years and successfully tried and argued many complex, diversified and precedent setting cases.

(b) She was the first female appointed law clerk to a Chief Justice of the Pennsylvania Supreme Court, the state's highest tribunal.

(c) She served for over 8 years as the first female Chief Counsel, Pennsylvania Water & Power Resources Board, Dept. of Forests & Waters (now Environmental Resources Dept.) assisting the then Secretary, Hon. Maurice K. Goddard.

(d) She served as first female counsel to the Pa. Auditor General, for whom she conducted a six month study on corporate taxation.

(e) She was the first female elected General Counsel to the Union of Polish Women in America, a fraternal benefit with over 10,000 female members in 4 states, and also served as a member of its Board of Directors for more than 8 years.

(f) She was the first woman Democratic and Republican candidate for Judge of the Court of Common Pleas of Philadelphia County.

(g) She was the first woman Democratic candidate for Judge of the Court of Common Pleas of Delaware County.

(h) She was an independent and party candidate for the office of state representative.

(i) She lectured at various national and international seminars and symposiums, including the Melvin Belli Seminar; at medical-legal symposiums held at various medical universities in the Orient and South America. She delivered a series of lectures at Villanova University on "Law & Life, or the ABC's of Law—from Abortion to Zoning."

(j) Articles written for publication include: "Quo Vadis Advocat?" "Recent Developments in the United States Regarding Abortions and Artificial Insemination" and "State Laws & Policies Governing the Development of Water Resources." She drafted legislation for the state of Pennsylvania; addressed political, social, educational and religious groups and appeared on radio and television.

(k) She served as the Political Chairlady of the Women's Rights Committee, Philadelphia Bar Association; on the Committee for Youth and Aging, Nat. Assoc. of Women Lawyers and was past Director of the University of Pennsylvania General Alumnae Association.

(l) She was listed in the *Worlds Who's Who of Women.*

(m) She received a Bachelor of Arts Degree in Journalism from the University of Pennsylvania,

where she was a scholarship student and honors major.

(n) She received a Doctor of Jurisprudence Degree from Temple University School of Law, where she also was a scholarship and honor student and completed a 4 year evening course in 2½ years while employed full time during the day.

(o) She has about 11 years federal government service and had never been the subject of disciplinary proceedings before.

7. On July 30, 1976, plaintiff was appointed temporary administrative law judge, GS-14, retroactive to April 11, 1976, which personnel action was received by her August 7, 1976. This promotion and change in status was due her by operation of law but Trachtenberg maliciously denied it to her as a retaliatory measure and after complaint by her complaint he was ordered by the Civil Service Commission to process the appointment. He falsely indicated thereon that the appointment was not timely processed because of an "administrative error."

8. On December 29, 1975, plaintiff (while a hearing examiner) held a hearing in the John C. Coleman SSI case assigned to her. Substantial fraud committed by Coleman was uncovered as a result of plaintiff's diligence and persistence, which both Coleman and his Philadelphia Community Legal Services, Inc., attorney, Linda Bernstein, suppressed. Coleman (who worked continuously for 32 years) failed to report his earned income as required by law. Nor had he made known his wife was receiving SSI benefits. He also had a pseudo-social security number so as to qualify as an eligible spouse of his wife.

The non-disclosure of his earnings resulted in an overpayment of supplemental security payments to Coleman and his wife, which plaintiff ordered him to repay. Bernstein and agency officials aided and abetted in the suppression of evidence Coleman and they knew they had a legal obligation to reveal. Ms. Bernstein tried to subvert the taking of Coleman's testimony. She claimed Coleman was qualified for increased monthly payments because he was entitled to exclusion for mortgage and real estate tax payments on a home owned by him, medical expenses, etc.; all of which proved untrue. Bernstein insisted plaintiff adjudicate the matter on the basis of her assertions and legal argument exclusively. Failing in this effort, she attempted to abort plaintiff's examination of Coleman by constantly interrupting his testimony to inject her version of the facts and instructed him not to answer plaintiff's questions. She defied plaintiff's admonitions and flouted her orders. She took the stand and gave conflicting testimony under oath. She failed to thereafter withdraw from the case as mandated by the Pa. Code of Professional Responsibility.

9. Immediately after the hearing in the Coleman case, Bernstein and various agency officials, at Trachtenberg's direction or with his condonation, engaged in improper and unlawful ex parte contacts and communications designed to pressure and intimidate plaintiff to withdraw from the case and surrender the files. Bernstein, in her ex parte letters, assailed plaintiff's competency, character, integrity and impartiality and presented her version of the facts. She asked the agency officials to interfere and remove plaintiff from the case. Chief Administrative Law Judge Philip Brown, to whom she sent one of her

several ex parte letters, promised, even before the case was completed and decided by plaintiff, that he would have Appeals Council review plaintiff's decision.

The pressures and intimidations exerted against plaintiff consisted, inter alia, of the following:

(a) ALJIC James Lightfoot tried to pressure her to respond to Bernstein's allegations and to voluntarily "recuse" herself from the case.

(b) ACRCALJ Sol Gitman threatened to have plaintiff investigated and fired.

(c) Trachtenberg, in response to two letters written to him by plaintiff requesting appropriate action be taken against Lightfoot and Gitman for their flagrant misconduct, attacked her for taking Coleman's testimony instead of hearing argument from Bernstein as requested by the latter; for criticizing Lightfoot and Gitman whose actions he wholeheartedly endorsed; for being "nondecisional in the Coleman case" and for "insubordination." He accused her of misunderstanding the decisional independence of the presiding ALJ and of being unproductive.

(d) Three devious attempts were made to wrest Coleman's files from plaintiff while the matter was still pending.

10. On February 27, 1976, plaintiff wrote to Trachtenberg in which she criticized the administrative deficiencies and illegitimate practices, referred to therein, that preponderated within the Bureau, and advised him of her intention to request their investigation. A copy of said letter is attached hereto and made a part hereof as Exhibit.

11. Aided and abetted by the agency, Bernstein directed Coleman not to attend supplementary hearings scheduled by plaintiff in the case for January 30, May 18 and July 22, 1976, with written notices to Coleman and Bernstein, and to defy a subpoena duces tecum issued to Coleman. Bernstein also defied a subpoena issued on her to appear for further examination on May 18, 1976. On April 20, 1976, she wrote she stood on the record "as fully developed on December 29, 1975 and requested an immediate decision."

12. On February 29, 1976, in a letter to Secretary Mathews, HEW, plaintiff documented, detailed and exposed the corrupt and illegal practices, gross abuses, inefficiencies, waste, mismanagement, etc., within the agency for which Trachtenberg was responsible and the intimidation and "double standard" to which she was subjected. She requested her allegations be investigated. She also sent a copy of this letter to the Chairman, House Appropriations Committee, HEW, U. S. Congress and asked that an independent congressional inquiry be made. Her letter states, inter alia (A copy of which is attached hereto and made part hereof as Exhibit):

> "The Social Security Program, if administered under present Bureau policies and practices will lead the nation to financial and moral disaster and ruin. . . . The policies adopted by the Bureau encourage a public give-away program. . . . There has been a considerable waste of funds in certain areas with which I am personally familiar."

13. Trachtenberg informed plaintiff, in a letter dated April 5, 1976, that he didn't intend to answer her allegations, as he was requested to by Secty. Mathews, because

"after he carefully considered the material submitted", he decided to recommend an adverse action against her.

14. He and his subordinates subsequently engaged in a series of oral and written contacts with the Civil Service Commission which counseled, advised and assisted in the drafting of a letter of Charges against plaintiff filed by Trachtenberg in April 1976. The Commission never served plaintiff with the charges, as required by regulation. These facts were uncovered during the cross-examination of Trachtenberg at plaintiff's removal hearings. The letter of charges dealt exclusively with the events in the Coleman case, as presented therein.

15. To lay the groundwork for plaintiff's removal, Trachtenberg undertook a "smear" campaign against plaintiff and assembled a "dirt" file. He enlisted the aid of Community Legal Services, Inc. and acting in concert and collusion, they covertly solicited, either through blandishment of rewards or fear of reprisal, complaints and adverse comments from attorneys, claimants, et al. Office personnel was requested to "spy" on plaintiff. Ms. Weiler, of CLS, wrote at "Bernstein's" request that in a case long since decided, plaintiff "ran the hearing". Lawrence Mendelson, CLS, wrote at Lightfoot's and Gitman's request, while making some vague and unspecific comments about plaintiff's "disposition", honestly stated that plaintiff "adhered to the standards of conduct expected of an administrative law judge." Richard Weishaupt, CLS, testified under oath Gitman asked him to please file a complaint against plaintiff.

In his zeal to slander and discredit plaintiff, Trachtenberg reached out into plaintiff's past and contacted her former employer, The City Solicitor's Office of Philadel-

phia, requesting it to furnish adverse comments about plaintiff. He also had rumors spread among appeals council personnel that plaintiff was crazy, anti-black, anti-alcohol, anti-poor and pro-Rizzo in order to prejudice them against her. Sam Lattner, appeals council analyst, was selected to specially review plaintiff's decision in the Coleman and Howard cases, as well as all of her cases, for the purpose of finding fault with them to manufacture evidence against plaintiff. Lattner was rewarded for his cooperation with a high quality award. Although Appeals Council lacks authority to review ALJ's decisions for "unfair hearings", Lattner made such "findings" in the Coleman and Howard cases. Appeals Council review, as provided by regulations (20 CFR 416.1466), is limited to (a) an abuse of discretion by the presiding officer; (b) error of law; (c) findings and conclusions are not supported by substantial evidence; or (d) there is a broad policy or procedural issue that may affect the general public interest.

16. Appeals Council files in the Coleman Case establish that the question of unfair hearing had never been raised by Coleman or Bernstein; that Appeals Council intended to affirm plaintiff's decision because her findings were supported by substantial evidence and were correct on the merits. No brief had been filed by counsel. The only reason the case was reviewed and remanded to another judge was because of Judge Brown's letter assuring Coleman's lawyer that plaintiff's decision would be reviewed. Lattner reviewed the case and wrote the decision for Appeals Council.

17. Community Legal Services, Inc. of Phila. also represented Pearl Taylor though it was barred by the Pub-

lic Service Corp. Act from handling fee-generating cases such as hers. Ms. Taylor testified at a hearing before plaintiff on June 13, 1977 that Appeals Council's Order of June 9, 1977 was part of a conspiracy to get rid of plaintiff. She repudiated the Order and attacked the Bureau and CLS for acting without her knowledge and authorization and for denying her the right to think for herself. She made it clear to them she did not want a change of judges but preferred to rely on plaintiff's integrity. She appeared at the hearing with her Minister and daughter, a college student. She testified Stein and Poindexter spoke to her on the phone the day before the hearing and told her her case must be separated from plaintiff's; that she had to take sides and join them in the battle, if she didn't she would go down in defeat. She stated CLS was a disappointment to the people they were to serve; they were not serving them but just helping themselves to them; that they were doing more harm than good because they are misusing you. In a letter to plaintiff dated July 3, 1977, copy of which is attached hereto and made part hereof as Exhibit. Mrs. Taylor condemned CLS's actions in her case. She said they tried to misuse her to discredit plaintiff's integrity and good name; that she did not authorize them to contact Washington and they did so without her consent. They acted against her wishes when they tried to force a change of judges in her case; that Poindexter, her new CLS attorney, refused to appear at the June 13th hearing; that because of his conduct she did not wish to be represented by CLS at that hearing but wanted to proceed with her Minister. She stated she was put in the middle of a situation that went much further than deciding whether or not she received her disability benefits; that her responsibility to her God would not

allow her to cooperate with such evil intentions and corruption.

18. At an earlier hearing held on February 15, 1977, Mrs. Taylor repudiated her CLS attorney Jonathein Stein for filing a motion to disqualify without informing her and for failing to advise her of their (CLS) feelings towards plaintiff. She branded their conduct "stoned politics." When Stein tried to pressure her to say that she would rather give her testimony to another judge because plaintiff was incapable of giving her a fair hearing, she told him plaintiff did nothing to her; that she couldn't say anything about plaintiff; that she could not make such a decision because it would be unfair to plaintiff and herself. She repeatedly accused Stein and Montes of misusing and abusing her for "their dirty work" and "their own ambition"; that she wasn't going to let them "abuse her for any dirty work"; that "black folks have been pushed around, mistreated, shoved around and done in"; that CLS "makes a rag mop out of you" "they throw you from one place to another" "to confuse your mind"; that "they ought to be ashamed of themselves." She said she did not wish to proceed with testimony on the merits of her claim that day because she wanted to bring her Minister in "to get to the end of this mess and find out what's going on. Because black folks have been abused and misused all the days of our lives." Despite Mrs. Taylor's request for a continuance, Stein demanded plaintiff proceed. The case was continued to permit Mrs. Taylor to bring in her Minister or anyone else.

19. On May 10, 1977, plaintiff entered an interlocutory order formally dismissing the Motion To Disqualify submitted by CLS and excluding Stein and Montes

from further participation in the Taylor case in view of their disruptive, obstructive, unethical and contemptuous conduct. Mrs. Taylor was given 30 days, or any additional time required, to secure other representation. On May 24, 1977, Bartholomew Poindexter, Esq., CLS, advised he represented Mrs. Taylor. A copy of the May 10, 1977 interlocutory order is attached hereto and made part hereof as Exhibit

20. On June 13, 1977, plaintiff, with Mrs. Taylor's knowledge and who wished to accompany her to file charges, requested the U. S. Attorney General David Marston to investigate and take appropriate action of the obstructions of justice and threats testified to by Mrs. Taylor. He refused stating the agency had already contacted him to take action against plaintiff.

21. On September 1, 1977, plaintiff issued her decision in the Taylor case wherein she found Taylor was precluded from engaging in substantial gainful employment since September 16, 1971 because of the severity of her impairment and was thus disabled under Title II of the Social Security Act since that time.

22. Appeals Council records in the Taylor Case showed that the Order issued on June 9, 1977 was rescinded on November 2, 1977 without notice to plaintiff. In its November 2, 1977 order it stated it was vacating plaintiff's decision because it was null and void and rescinding that portion of its earlier order remanding the case to Gitman for reassignment; that, though barred from issuing initial decisions by the Administrative Procedure Act, it would proceed to a decision. The decision, ironically, was based on the testimony adduced by plain-

tiff at the June 13, 1977 hearing, which hearing Appeals Council presumed to invalidate.

23. On April 2, 1975, plaintiff, while a hearing examiner, heard the Earleen Howard Case. The hearing lasted from 2:40 to 4:40 P.M. and four witnesses testified. The record was held open for a long time for submission of post hearing evidence. A 13 page decision was issued by plaintiff denying claimant benefits. Howard was represented by Community Legal Services. The request for review filed with Appeals Council (by another CLS attorney) stated simply that the decision was not supported by substantial evidence. The case was reviewed by Sam Lattner for Appeals Council. The Appeals Council files show no charge of unfair hearing was made. A medical advisor's opinion was obtained by Appeals Council (Dr. Peter Oberhoff) who stated in his written opinion that claimant's impairment was not disabling nor was the pain alleged disabling (as had plaintiff). This expert medical opinion paid for at public expense was ignored. Analyst Lattner's opinion was preferable. The case was remanded to a Harrisburg ALJ who filed a one page decision without discussing any medical or other evidence and granted supplemental security income to Howard. This one page decision, unsupported by evidence and finding, was not reviewed by Appeals Council.

24. On July 9, 1977, plaintiff received a certified letter dated July 5, 1977, from Joseph B. Scott, Deputy General Counsel, Civil Service Commission, "Re: In the Matter of Wanda P. Chocallo, *Administrative Law Judge (Temporary)*, Bureau of Hearings and Appeals, Social Security Administration, Docket No. 6" notifying her that the Bureau filed with the Commission a letter of charges

proposing to *"remove her from the position of Administrative Law Judge (Temporary)."* He enclosed a copy of the Charges which was signed by Robert L. Trachtenberg, Bureau Director. Charges I and II relate to the Pearl Taylor case. *Charge I* states that plaintiff wilfully disobeyed a lawful order of Appeals Council issued June 9, 1977. The "Specifications" in support of the charge stated Stein and Montes were accused by plaintiff at the February 15th hearing of unethical practices, of misusing Ms. Taylor and of impudent conduct. It also referred to plaintiff's interlocutory order of May 10, 1977 issued because of Stein's and Montes' conduct and stated it did not conform to the procedures governing the permanent suspension or disaqualification of representatives from appearing before the Social Security Administration (which did not apply in this instance). It then referred to what Appeals Council's Order of June 9th purported to do. It purported to vacate plaintiff's interlocutory order (which it was without legal authority to review and vacate). It purported to remand the case to the Acting Regional Chief Administrative Law Judge in Philadelphia with instructions that he assign the case to another judge within 10 days. (This, too, was barred by the APA). It also, contradictorily, purported to remove the case to itself for hearing and decision. (This likewise is barred by the APA since Appeals Council members are not appointed under the APA and cannot hear and decide social security cases.) The order was not on its face or by its terms directed to plaintiff. It did not order her to do or not to do anything.

Charge II states plaintiff refused to relinquish and deliver the Taylor files and refused to comply with proper

demands upon her to relinquish same. The specifications on which this charge is predicated merely recite certain requests allegedly made by various agency personnel.

The order of June 9, 1977 was ultra vires and null and void on its face. Under the Administrative Procedure Act exclusive jurisdiction is vested in the presiding administrative law judge to hear and decide the case without agency interference, interruption, supervision and review.

Charge III states ALJ Chocallo (T) demonstrated a lack of judicial temperament and failed to conduct herself in an impartial and unbiased manner which caused Appeals Council to remand. The specifications which lacked specificity and failed to conform with CSC regulations, referred to only 3 cases, out of the more than 700 cases heard by plaintiff at that time, viz., Taylor, Coleman and Howard. No specifics were given with respect to the Taylor case. The specifications were vague and merely referred to Appeal Council vacating plaintiff's interlocutory order and remanding the case to another judge; that the excerpts quoted in her opinion raised serious questions about her judicial demeanor and temperament. The specifications with regard to the Coleman case state that Appeals Council issued an order vacating ALJ (T) Chocallo's decision and remanded the case to another judge because of prolonged questioning of claimant in a demeaning and improper fashion; verbal disputes between plaintiff and Bernstein compromised plaintiff's impartiality; persistent interruptions of claimant's attorney during claimant's testimony did not permit Bernstein full latitude to develop the case; and plaintiff's bias toward

Bernstein was reflected in exchanges during the proceedings and by characterizations of the attorney's behavior, personality and integrity in the decision itself.

The specifications with regard to the Howard Case stated that the case was remanded to another ALJ for a new hearing because claimant had not been afforded a fair and impartial hearing because ALJ (T) Chocallo allowed specific questions and additional testimony with much reluctance and her admonishment that claimant's CLS representative expedite his questioning because of another hearing *appeared* to have deprived the CLS representative of sufficient latitude to develop the case at the hearing.

25. The Charges, on their face, do not charge plaintiff with violating any promulgated Standards of Conduct. They do not charge her with any published offense subject to penalty that was made known to her. They do not charge her with the wilful violation of any law. They do not charge her with dishonesty, corruption, fraud, malice or bad faith. The Government consistently maintained that plaintiff was not charged with violating any standards of conduct; that no standards of conduct exist; that her conduct at the 3 hearings come within the purview of "agency administrative supervision;" that though her "ultimate decision" is not "controlled", the "manner in which she holds hearings and issues orders is subject to question and review of Bureau officials." That plaintiff is but a mere "employee" whose status cannot be equated with that of a judge within the federal system; that the "APA casts the ALJ in a role of a subordinate whose independence does not extend past decid-

ing the facts and law of individual cases to determine whether claimants are entitled to benefits"; that plaintiff's actions in the Taylor, Coleman and Howard cases considered alone demonstrate that she does not have the proper temperament to be an ALJ with BHA; that "a reasonable man" standard of conduct applies to her actions and these proceedings. ALJ McCarthy, in refusing to rule on plaintiff's Motion To Dismiss before taking evidence, stated: "The taking of evidence will illuminate the real controversy and *enable the Commission to ultimately articulate definitive legal principles that have application to an actual rather than an academic problem.*"

26. The Charges, on their face, involve judicial functions, (which are privileged and protected by the doctrine of judicial immunity), and unlawfully infringe upon plaintiff's decisional independence and the exclusive jurisdiction vested in her by the Administrative Procedure Act, to hear and decide cases assigned to her; to regulate the entire course of the proceedings; to rule on preliminary and other matters and motions; to examine witnesses and parties for a full disclosure of the true facts; to control and censure parties, witnesses and counsel for their improper conduct, and to issue a final decision on the basis of the record before her in accordance with her independent judgment, free from pressure by parties or officials within the agency. The agency is barred by law from "in effect conducting hearings from behind the scenes where it cannot know the detailed happening in the hearing room" as it did in the Coleman and Taylor cases.

27. The Bureau Director failed to aver and prove that he had lawful authority to file the letter of charges

against plaintiff. Nor did he aver and establish that the Civil Service Commission was empowered by law to assume jurisdiction over the subject matter of the charges and to review plaintiff's actions and decisions in the Coleman, Taylor and Howard cases, prohibited by the Social Security and Administrative Procedure Acts.

28. Trachtenberg, in an affidavit dated September 27, 1977, gave the following reasons under oath for filing these charges against plaintiff:

> "Based primarily on ALJ Chocallo's action in the Taylor case, I decided to file a letter of charges against her. I had been dissatisfied with her conduct in the Coleman (Mr. 'Doe') case and generally displeased with her attitude. It was, however, *her conduct in barring Mrs. Taylor's attorney from further representation without due process* and her definance of the Appeals Council's Order which finally prompted me to take this action. I considered both acts to be gross abuses of discretion and in contravention of the law and regulations."

29. Jonathein Stein, Community Legal Services Attorney, whom Mrs. Taylor repudiated as her attorney, in violation of his professional obligations under the Pa. Code of Professional Responsibility and the ex parte prohibitions of the Administrative Procedure Act wrote ex parte letters to agency officials dated February 15, 1977, April 6, 1977 and June 2, 1977 discussing the merits of the Taylor case and viciously attacking plaintiff's integrity and demanding her removal from office. These letters were sent without Mrs. Taylor's knowledge and consent and without plaintiff's knowledge. Copies of these letters are attached hereto and made a part hereof as Exhibit

30. Stein's and Trachtenberg's actions corroborate Mrs. Taylor's statements under oath that they were using her case as part of a conspiracy to "get rid" of plaintiff. Neither Trachtenberg nor Stein showed the slightest concern for Mrs. Taylor's rights.

31. Mrs. Taylor stated in her July 3, 1977 letter that the actions taken by CLS were not in her best interest. It is difficult to see what disadvantage Taylor suffered at the hands of plaintiff. The one with standing to assert such disadvantage could not be clearer in her approbation of Judge Chocallo's integrity and her condemnation of CLS and the agency.

32. The fact that Trachtenberg sanctioned and condoned the highly unethical, scandalous and libelous conduct of Stein, as well as of Bernstein, further corroborates the fact that they were acting in concert to assist Trachtenberg in effectuating plaintiff's removal.

33. Trachtenberg testified he never met plaintiff; never spoke to her; never discussed the Coleman, Taylor or Howard cases with her; never obtained any statements from Taylor, Coleman or Howard before or after filing the charges against plaintiff.

34. On December 20, 1976, plaintiff wrote to the U. S. Civil Service Commission, Washington, D.C. requesting that it investigate the improper and unlawful activities of the Bureau of Hearings and Appeals in the Coleman Case. On January 12, 1977, the Commission replied that "in absence of specific reference to a provision of the law or regulations administered by the Commission," it was unable to initiate action in the situation on the "basis of the information furnished."

35. The Commission wilfully and unlawfully failed to apply the law as enunciated by it and the Attorney General in an opinion to the Department of Interior dated January 18, 1977 wherein it is stated: "The Commission has been looked to by the courts to 'prevent any devious practice' subversive of the proper independence of administrative law judges and it is the agency generally charged by Congress with supervision of the administrative law judge program."

36. The MSPB (formerly Commission) failed to apply the law enunciated by it in its decision of May 18, 1972 issued *In the Matter of Bernard J. Hasson, Jr.*, Hearing Examiner, ICC, U.S. CSC Docket No. 4. Hasson was specifically charged with violating various provisions of the Interstate Commerce Commission's Canons of Conduct, 49 C.F.R. 1000-735.14 etc. The Commission declared that Executive Order 11222 of May 8, 1965 authorizes the Civil Service Commission to provide general standards of conduct for persons in the civil service and to issue regulations to implement the ethical conduct standards set out in the Order. It stated: "The Commission's regulations provide for the issuance of regulations by each agency head prescribing standards of conduct and responsibilities for employees."

37. The MSPB, in the instant proceedings, contrary to law arbitrarily articulated subjective standards that are vague, indefinite and ambiguous and based on emotion, prejudice, hostility, interest, etc.; were not previously published and made known to plaintiff but were applied "ex post facto" and are still not known to plaintiff. "Good cause" has never been separately defined and promulgated by the MSPB but, obviously, was regarded as encompass-

ing the Standards of Conduct promulgated by Departments, consistent with the Code of Ethics for Government Employees. Section 3, subparagraph (2) of the Civil Service Reform Act expressly states and provides that "*prohibited personnel practices should be statutorily defined to enable Federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system.*"

38. Standards of Conduct for all HEW officers and employees, including administrative law judges, were promulgated and appear in 45 USC 73.735-101 et seq. HEW Personnel Guide for Supervisors, Chapt. VIII—Complaints, Grievances, Appeals, HEW, III T.S. 5A (1/17/77) provides in pertinent part, inter alia:

> "The provisions of this guide are applicable to all HEW Region III employees and supervisors . . . insure that the action is not arbitrary, capricious, or discriminatory due to race, religion, color, sex, or age. Be certain that the disciplinary action is based on specific provable facts. . . a. Removal is the severest disciplinary action in that employment is terminated and the affected employee's prospects for future employment within or without the Government is diminished. Except in certain circumstances, removal would be considered only after a progression of lesser disciplinary measures had failed to correct the conduct and/or performance deficiency. . . The severity of major adverse actions mandates that managers be particularly careful to exercise fair and responsible judgment; making certain that such actions will clearly . . . promote the efficiency of the service."

39. The impropriety of these proceedings are underscored by the following statement quoted from ALJ McCarthy's Recommended Decision:

> "This case is precedent-setting in that it is the first in which the Commission has been called on to examine the performance of adjudicatory functions by a hearing officer appointed to conduct formal proceedings under the Administrative Procedure Act. By reason of Charge III the Commission is asked to enter the hearing room in effect, and to observe the manner in which Judge Chocallo presided at the hearings in three cases. In each case, the Appeals Council decided that the claimant seeking benefits under the Social Security laws, was denied a fair hearing due to respondent's conduct necessitating a remand of the cases for a new hearing before a different administrative law judge. The Commission must decide whether apart from the fair hearing issue, the respondent's conduct and demeanor in the courtroom show that she should not be retained as an administrative law judge."

40. Because plaintiff exposed those who put personal and political ambition and interest ahead of public good and had the courage and determination to resist pressures exerted by irresponsible demagogic administrators in order to preserve the integrity and impartiality of the Social Security adjudicative process, she was subjected to various reprisals including, but not limited to (a) the unlawful withholding of a promotion due by operation of law for almost seven months; breaking and entering her locked office and making an unlawful search and seizure without warrant; the unlawful confiscation of her salary

check; the unlawful tampering with payroll and leave records; the false certification of a salary overpayment in an attempt to "extort" $885.48; retroactively changing plaintiff's annual leave charges to AWOL and deducting monies from her salary without authorization from her; falsifying personnel papers; falsely assailing her production while at the same time refusing to furnish statistical data requested on the ground that "Computer print out—it is very inaccurate data, it's not relied upon by anyone." (Statement made by Appeals Council Attorney, D. Brzybylinski, at pretrial conference, p. 12) She was denied competent help. She was denied a staff attorney provided to all other ALJs. Cases were selectively assigned to her—the oldest and most undesirable. Assignment of cases was withheld sporadically.

41. On August 31, 1979, with follow up on November 20, 1978, plaintiff wrote to Attorney General Benjamin Civeletti requesting that he promptly undertake an investigation of the federal laws broken by agency officials and that a special prosecutor be named. Copies were sent to President Carter and also to Secretary Patricia Harris, HEW. No response was received. She also wrote to the U. S. Controller General, Mr. Elmer B. Staats and requested that a thorough investigation be conducted by his office. On December 13, 1979, the U.S. General Accounting Office replied that it does not generally investigate individual cases and regretted that "we can be of no further assistance to you."

42. Numerous lawsuits were filed against Trachtenberg by claimants (as well as by administrative law judges) throughout the country charging him with initiating and fostering policies and practices that impaired the

impartiality of the Social Security administrative law judges and the integrity of the judicial process which necessitated the appointment of special counsel. No removal action was initiated against Trachtenberg. While he was invited to leave the Bureau, he was in effect rewarded for his unlawful activities with a promotion as a deputy secretary within HEW.

43. Plaintiff avers that the entire proceeding represents unlawful discriminatory selective prosecution and persecution against her, based upon sex and upon her free exercise of first amendment privileges as to speech and association. Further, that the actions of Trachtenberg were motivated by actual malice and with a desire and intent to injure and destroy her personal and professional reputation and by a wilful, deliberate and malicious and conscious intent to bring all ALJs under the direct supervision and control of agency administrators in all matters, including the prohibited and protected area of the judicial or quasi-judicial decision making process.

44. At no previous time have charges been brought against an ALJ seeking removal on these grounds, notwithstanding it is admitted by the agency that other ALJs have failed or refused to comply with Appeals Council Orders directed to them and on numerous occasions decisions of ALJs have been reversed by the courts on the ground of denial to claimant of a fair hearing.

45. ALJ McCarthy improperly ruled preliminarily that the evidence of discrimination against plaintiff would not even be considered.

46. Plaintiff believes and avers that, as demonstrated by its actions to date, it is not the intent of the Merit Systems Protection Board to protect the "whistle-

blowers" as mandated by Congress, but rather to "lure" them out into the open so that they can be more readily ousted out of Government to cover up corruption and shield the corruptors—a strategy commonly employed by dictatorships.

47. The Court is requested to hold unlawful and set aside the Merit Systems Protection Board's actions, findings and conclusions for the following reasons:

(a) The order of the MSPB is in excess of its statutory jurisdiction, authority and limitation and is short of statutory right.

(b) The letter of charges filed in July 1977 were never amended and requested plaintiff be removed from the position of "*Temporary*" Administrative Law Judge (GS-14). The action of the MSPB is unlawful in that it removes plaintiff from the office of permanent administrative law judge, GS-15, to which she was appointed in January 1979.

(c) The action of the board is contrary to plaintiff's constitutional rights, powers, privilege and immunity.

(d) The letter of charges fails to state a cause of action and fails to establish and aver the statutory authority empowering the initiator thereof to file such charges.

(e) The MSPB and ALJ McCarthy exceeded the scope of their authority by sua sponte revising, amending and enlarging and, in effect, instituting a new cause of action.

(f) The Board failed to show the ruling on each finding, conclusion and exception presented by plaintiff and the reasons or basis therefor.

(g) The Board failed to make specific findings and subordinate findings as to all material issues of fact, law and discretion.

(h) The Board failed to set forth in its decision a reasonable review of the evidence, the weight which has been given this evidence; its own resolution of conflicts therein; and findings and conclusions necessary to support its ultimate finding.

(i) The Board failed to reach its own conclusions upon the evidence as required by law.

(j) The Board's action is unsupported by substantial evidence.

(k) The Board's action is arbitrary, capricious, an abuse of discretion and usurpation of power and not in accordance with law.

(l) The Board's action is without observance of procedure required by law.

(m) The Board's decision contains various misstatements. The Board did not hold hearings in this case on September 11, 1979, as misstated therein. The Board heard oral arguments and, contrary to the contents of its order setting the matter down for argument, it refused to hear the facts. It limited argument to two legal questions posed by it.

(n) The recommended decision contains various misstatements and distortions and misapplications of the law.

(o) ALJ McCarthy did not conduct himself in an impartial manner and denied plaintiff a fair hearing.

(p) The Board, contrary to law, failed to rule on plaintiff's Motion and Supplementary Motion to Dismiss; Motion to Disqualify; Motion for Summary Judgment; Motion to Strike etc.; Motion that the record be reopened for the taking of additional relevant testimony reflecting on the retaliatory motives of Trachtenberg.

(q) The Board misinterpreted and misapplied the law and Constitution of the United States.

(r) The Board's decision is unwarranted by the facts.

(s) The Board committed serious error by refusing to consider the charge of discrimination, retaliation and malice.

(t) Section 7521 of Title 5, United States Code is unconstitutionally vague and indefinite.

48. Trachtenberg fraudulently and unlawfully issued orders as Appeals Council member in other cases assigned to plaintiff, viz., the Carmelita Verden, Dominic Valentine, Stella Barauskas, Albert Blackwell, Francisco and Iradio Ocasio, Margaret Leech, William L. Macklin, Sr. social security cases, wherein he purported to remove them to Appeals Council for hearing and decision. He admitted while testifying in plaintiff's removal proceedings that it was not his intention to have the cases heard by Appeals Council; that his purpose for issuing the orders was to have the cases reassigned to another judge. These cases were unduly delayed for hearing as a result of Trachtenberg's unlawful orders, resulted in additional unjustified costs and expenses and labor at public expense and impeded the efficiency and economy of the service. Mr.

Valentine complained about the delay incurred. Each case was subsequently returned by Trachtenberg to the Philadelphia hearing office deceptively marked "Remanded" and selectively reassigned to another judge more acceptable to the agency, all in willful and deliberate contravention of the provisions of the APA. Such orders were not only tainted with illegality but by actual fraud. Trachtenberg's successor in office, Associate Commissioner Andrew Young, likewise issued a similar order thus perpetuating the corrupt and illegal practices rampant within the agency.

49. The illegal and corrupt practices, all of which are inimical to the public's rights and interests, were reported to Secretary of HEW, Patricia Harris, and to the President of the United States who pledged to restore a government that tells the truth and obeys the law. No response or action was elicited.

50. Trachtenberg's successor, Associate Commissioner Andrew J. Young, Office of Hearings and Appeals authorized and/or condoned the unlawful confiscation of plaintiff's salary check for the pay period ending July 14, 1979 and in the fraudulent Certification of Salary Overpayment dated August 7, 1979 which falsely stated claimant was AWOL during the payroll period ending 12/30/78 and was improperly paid and owed the government $885.48 which it would deduct when in fact plaintiff was on annual leave and had been charged with annual leave. He also authorized and/or condoned the doctoring of the payroll and time and leave records in deprivation of plaintiff's rights and, contrary to law and his oath of office.

51. Former Attorney General Griffin J. Bell stated that "Our Constitution imposes the duty on the President

to see that the laws are faithfully executed." President Carter addressed the Nation in the following words: "Can our Government be honest and decent and open? Our Government in Washington ought to be an inspiration to us all and not a source of shame. My job as President will be to set a standard of morals and decency and openness. Errors or wrongdoings will be immediately revealed and an explanation given to the public along with corrective action to prevent any recurrence."

WHEREFORE, plaintiff requests the following relief:

1. That the Court review the entire record in the administrative proceedings brought against plaintiff under the provisions of 5 USC 7521, designated Civil Service Commission Docket No. 6, particularly with regard to the matters set forth herein.

2. That the Court hold unlawful and set aside the action of the Merit Systems Protection Board and find that such action is contrary to plaintiff's constitutional rights, power, privileges and immunity, is discriminatory and retaliatory, is without statutory right, power, jurisdiction and authority and without procedures required by law; is arbitrary and capricious and unsupported by substantial evidence.

3. The Court order that plaintiff be restored to her office of permanent administrative law judge at the Philadelphia office, without any loss of intervening benefits and increments and that she be awarded back pay and all increments, as if the termination order of the MSPB had never been effectuated.

4. The Court order that all evidence and documents relating to the action brought against plaintiff be expunged from all personnel and other official and unofficial records of any agency, department, etc. of the Executive Branch of Government.

5. General damages in excess of the sum of $20,000 from defendants for:

(a) Unlawfully punishing her in retaliation for plaintiff's exercise of her constitutional rights of free speech and for refusing to submit and surrender to agency, group, partisan and political pressures in discharging her judicial functions and rendering her decisions, regardless of personal consequence and in accordance with her faithful, fearless, independent and honest interpretation of the laws and Constitution.

(b) Inflicting cruel and inhuman punishment and extreme penalties for actions which at the time of their commission did not constitute a punishable offense.

(c) Unjustly and unlawfully discriminating against plaintiff because she had the courage to discharge her judicial functions independently, impartially and with integrity in order to preserve, maintain and enforce the integrity of the judical system and refused to be a party to the evasion or breaking of the laws she was duty bound to uphold.

(d) Unjustly, maliciously, discriminatorily and unlawfully disqualifying plaintiff from her lawful office and depriving her of the happiness and pursuits of her vocation and the emoluments, privileges and honors attached and arising therefrom.

(e) Willfully and wantonly and maliciously injuring plaintiff's profession and personal reputation, integrity, competency and character with the intention to cause grievous harm to her and to discredit, vex, humiliate, embarrass and destroy her both emotionally, mentally, physically and financially.

(f) Unlawfully devising subjective standards and applying them retroactively to plaintiff selectively and singularly because she had the integrity, strength and courage to be an "independent" judge who rendered justice impartially and who cried out against government pressures, corruption, waste, giveaways, etc. because of her knowledge and belief that an absolutely independent and fearless judiciary is indispensable to justice and freedom and is willing to fight to uphold these tenets.

(g) Unlawfully punishing plaintiff in order to chill critical comment and exposure of corrupt practices and to make the judiciary subservient to the will of recreant officials.

(h) Outrage and mental and physical damage to plaintiff's person.

(i) Unlawfully punishing plaintiff simply for offending the sensibilities and ego of defendant Trachtenberg and those who condoned his unlawful conduct, law breaking and trafficking with the truth.

(j) Unlawfully punishing plaintiff for writing to members of Congress, the President and other persons and officials.

(k) Intentional interference with plaintiff's existent and prospective economic advantages.

(l) Monetary compensation for and/or the actual restoration of all leave plaintiff was required to use and compensation lost in defending herself in this action.

(m) Punitive damages since the charges were filed not from any notion that the several acts designated and indicated an unfitness for the calling but because it was thought that the acts of decisional independence deserved punishment and that there was no way of inflicting punishment except to deprive plaintiff of her rights, dignity, privileges and honors as a judge and to discredit her unblemished professional and personal reputation and integrity. They were not motivated by a lofty legitimate purpose designed to secure the public interests but rather by a desire to silence the judiciary and make it servile to the will of despotic officials.

(n) Punitive damages for being punished for faithfully executing her public trust by refusing to validate an illegal order, in defiance of the wishes of the then Bureau Director and Community Legal Services, Inc. The potential danger of what occurred here is that it permits a small active group of so-called public service lawyers, with a "rule or ruin" motto, in concert with public officials, with a "might makes right" policy to hold a judge hostage because of the threat or fear of a removal drive.

6. No Chief Executive of any nation or state, who is worthy of his high post and who measures up to his responsibilities will tolerate the existence in his jurisdiction of any official, body, group or organization which sets itself up as superior to the sovereignty and is scornful of its laws. The President made a solemn pledge that he would restore a government that told the truth and

obeyed the law. He must be faithful to his stewardship and must "clean house" and remove those top level officials whose actions corrupt truth, law and constitutional morality.

In order to secure the liberty and fundamental rights of all the people of this Nation and Preserve the integrity and independence of the judicial system upon which the freedom of the citizenry depends, the Court is requested to issue an appropriate order mandating President James Carter, Chief Executive of the United States of America who has a constitutional duty to see that the laws are faithfully executed, to expel from Government those officials designated hereafter, who broke their most sacred trust to uphold the laws and never be a party to their evasion: Robert L. Trachtenberg, Dept. HEW; Ruth Prokop and Ersa Poston, MSPB, Washington, D.C.; John McCarthy, ALJ, MSPB, Washington, D.C.; Andrew J. Young, Assoc. Commissioner, OHA, SSA, HEW, Arlington, Va.; Philip Brown, CALJ, OHA, SSA, HEW, Arlington, Va.; Sol Gitman, RCALJ, OHA, SSA, HEW, Phila., Region III Office; James C. Lightfoot, former ALJIC, OHA, SSA, Philadelphia, Pa.; Patricia Harris, Secretary, HEW, Washington, D.C.; Irving Friedenberg, OHA, SSA, HEW, Arlington, Va.; Jan Sagett, former Deputy Director, OHA, SSA, HEW; Benjamin Civelletti, Attorney General, Washington, D.C. and such other individuals within the Government presently unnamed.

7. Restraining orders and temporary and/or permanent injunctions as and when necessary during the course of this proceeding.

8. Reasonable attorney fees and costs and expenses.

9. Such other and further relief as the Court deems just and proper.

(s) Wanda P. Chocallo
Wanda P. Chocallo, Esq.
308 Maple Avenue
Drexel Hill, Pa. 19026
Plaintiff, in pro per

DEMAND FOR TRIAL BY JURY

Plaintiff herein demands trial by jury on such issues as are to be heard de novo and in other issues in the above cause.

(s) Wanda P. Chocallo
Wanda P. Chocallo
Pro Se

Dated: April 25, 1980

Memorandum, Opinion and Order,
Merit Systems Protection Board

In the Matter of Wanda P. Chocallo, Administrative Law Judge, Social Security Administration, Department of Health, Education and Welfare

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CSC Docket No. 6

MSPB Docket No. A15-90-74

MEMORANDUM, OPINION AND ORDER

This matter comes before the United States Civil Service Commission* in June of 1977 following the filing of a written letter of charges against the respondent by the Director of the Bureau of Hearings and Appeals of the Social Security Administration of the Department of Health, Education and Welfare. That letter set forth essentially three charges upon which the removal was based, namely: (i) the disobedience of the respondent in conducting a hearing in a case which had been removed from her jurisdiction; (ii) the refusal of the respondent to obey

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* Effective January 1, 1979, the Civil Service Commission was reorganized into the Merit Systems Protection Board and the Office of Personnel Management (Reorg. Plan No. 2 of 1978, 43 *Fed. Reg.* 6037). The Civil Service Reform Act of 1978 (Pub. L. No. 95-454) codified the reorganization and provided the authority to the Board to carry out the adjudicatory functions previously vested in the Civil Service Commission. Thus the Board as the successor organization to the Civil Service Commission has jurisdiction over this matter. (See 5 U.S.C. §7521)

an order directing her to make available the files in said case; and (iii) the lack of judicial temperament as well as bias and partiality displayed by respondent in the course of three hearings before her.

On December 5, 1978, pursuant to 5 U.S.C. §557 and 5 C.F.R. §930.232, Administrative Law Judge John J. McCarthy issued a decision in this matter recommending to the Commission that it find that "good cause" has been established for the removal of Wanda P. Chocallo from the position of Administrative Law Judge in the Social Security Administration.* Subsequently, the Merit Systems Protection Board held hearings in this case which were conducted on September 11, 1979. These hearings were limited to entertaining the issues of:

(i) what standard of proof does the good cause requirement of 5 U.S.C. §7521 impose on the Board in hearing actions against an administrative law judge; and

(ii) can an administrative law judge be removed because of adjudicating actions taken by him or her in the course of an administrative proceeding.

In determining what action to take upon the recommended decision the Board has reviewed the decision and

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* This action was brought pursuant to 5 U.S.C. §7521 which provides that an administrative law judge appointed under 5 U.S.C. §3105 may be removed by the employing agency only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing. This provision was reenacted by the Civil Service Reform Act with the jurisdiction being granted to the Board to hear such cases as the successor to the Civil Service Commission.

exceptions and responses thereto. Moreover as previously noted, it has held hearings on the matter wherein both respondent and the Social Security Administration were provided with an opportunity to further elaborate on the significant issues of this case. In light of all these considerations, the Board has determined that it is appropriate to affirm the rulings, findings and conclusions as set forth in the attached recommended decision and therefore it is hereby adopted in full.*

Judge McCarthy's decision in this matter is meticulous, well-conceived and a correct interpretation and application of the facts and law. Thus the Board has not found it necessary to revise it in any manner. However, because it deals with an issue of major significance which has not been previously entertained, it is the determination of the Board that it would be remiss if the Board itself were not to at least comment on this matter. That issue, as previously set forth, is whether an administrative law judge can be removed on the basis of actions taken by him or her in the course of an adjudicatory proceeding.

As Judge McCarthy rightfully asserts in his decision, an administrative law judge is not immune from review for misconduct, incompetence or other failings in the performance of his/her duties. However, as he also correctly recognizes, important considerations must be given to the fact that in order to carry out the decision-making process in an objective and equitable fashion an administrative

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* Since he was not a member of the Board at the time of the hearing, Board Member Romand P. Werthein has not participated in this decision.

law judge must be free of harassment, intimidation or improper influences from agency officials. Nonetheless, this does not give that judge carte blanche authority to conduct the government's business in a biased and destructive fashion which undermines and causes disrepute on the adjudicatory process. The fact that an administrative law judge carries out his/her duties in a hearing room rather than an office does not provide an impenetrable shield from appraisal of performance.

Given these two considerations, a careful balance must be created between judicial independence and judicial accountability. This stance is in keeping with the major underlying purposes of the Administrative Procedure Act. This Act, among other things, gave birth to the administrative law judge as an entity independent from other functions of the agency. Specifically, that independence was created to ensure the elimination of the conflict of interest inherent in the prosecutor and the adjudicator being vested in a single unit.* However, while insulating the administrative law judge from improper outside influence which might compromise the judicial process, the Act also provided for accountability of that judge by setting forth a procedure for removal by an independent body, to wit the Board. Moreover, the Act and its accompanying legislative history does not provide any support for the contention that conduct within the course of an adjudication may not be considered as a basis for removal or other adverse

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* See, e.g., Legislative History of the Administrative Procedure Act, Sen. Doc. No. 248, 79th Cong., 2d Sess., 262 (1946), [Report of the House Committee on the Judiciary on Sen. 77]

action. Therefore, the Board can find no justification for self-imposing such a restriction.*

While the Board is aware of the fact that this decision establishes an important precedent in this area, it would hasten to admonish agencies considering proposing actions similar to this one that they will be very carefully scrutinized for adequate bases in meeting the "good cause" standard. Imposition of this degree of review in such instances is essential to ensure the necessary balance between the interest to be considered and the Board will not neglect its duty in fulfilling that goal.

THEREFORE, for the reasons set forth above the recommended decision is hereby AFFIRMED.

FOR THE BOARD:
Ruth T. Prokop
Chairwoman
Ersa H. Poston
Vice Chair

Date: March 20, 1980

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* Perhaps the most substantive, albeit sparse discussion of the basis for removal of an administrative law judge is found in the "Report of the Committee on Administrative Procedure" convened at the request of President Roosevelt wherein it is stated that:

> Each hearing commissioner shall be removable only . . . upon the statement of charges by the agency that he has been guilty of malfeasance in office or has been neglectful or inefficient in the performance of duty. [Sen. Doc. No. 8, 77th Cong., 1st Sess., 238 (1941)]

UNITED STATES CIVIL SERVICE COMMISSION
Office of the General Counsel
Washington, D.C. 20415

July 5, 1977

In reply please refer to
GC:LEG 3-2-2
RHM:sfm
Your reference

Honorable Wanda P. Chocallo
Administrative Law Judge (Temporary)
308 Maple Avenue
Drexel Hill, Pa. 19026

Recvd 7-9-77

Dear Ms. Chocallo:

Re: In the Matter of Wanda P. Chocallo, Administrative Law Judge (Temporary), Bureau of Hearings and Appeals, Social Security Administration, Docket No. 6

This is to notify you that the Bureau of Hearings and Appeals has filed with the Civil Service Commission a letter of charges in which it proposes to remove you from the position of Administrative Law Judge (Temporary). A copy of the letter of charges is enclosed.

The Commission will determine, pursuant to section 7521 of Title 5 of the United States Code, whether there exists good cause to remove you. Proceedings in this matter are governed by applicable Civil Service regulations, found in 5 CFR §§930.221-930.234.

In accordance with 5 CFR §930.223, you have fifteen days from the date of service of the letter of charges within which to file with the Commission an answer (original and four copies) to the letter of charges. Your response, which should be directed to this office, must specifically admit, deny or explain each reason alleged in the letter of charges, unless you are without knowledge. In the event you are without knowledge of a reason, you must so state. If you do not file an answer to the charges within the time allowed, the Commission will proceed in regular course on the charges.

If you have any questions concerning the procedures to be followed, please feel free to call upon me.

Sincerely yours,
Joseph B. Scott
Deputy General Counsel
Carl F. Goodman
General Counsel

Enclosure

Letter of Charges

Jun 20, 1977

IHA-11

Mr. Carl F. Goodman
General Counsel
U.S. Civil Service Commission
Room H-30
1900 E. Street, N.W.
Washington, D.C. 20415

Dear Mr. Goodman:

The Bureau of Hearings and Appeals of the Social Security Administration proposes to remove Wanda P. Chocallo, who was appointed to the position of administrative law judge (temporary) pursuant to section 3 of P.L. 94-202 (89 Stat. 1135). Pursuant to 5 U.S.C. 7521 and to the regulations promulgated thereunder, this matter is referred to the Civil Service Commission to determine if there is good cause for the removal of this administrative law judge. The charges against Wanda P. Chocallo are as follows:

CHARGE I

ALJ (T) Chocallo did willfully disobey a lawful order of the Appeals Council in the case of Pearl Taylor, Social Security Account Number 201-22-5316, by conducting a hearing in said case after having knowledge and proper and official notice that said case had been removed from her jurisdiction, to wit:

SPECIFICATIONS

1. On February 15, 1977, ALJ (T) Chocallo conducted a hearing in the claim of Pearl Taylor, who had applied for Supplemental Security Income benefits under

the Social Security Act, as amended. During the course of the hearing, ALJ (T) Chocallo accused Pearl Taylor's duly authorized and appointed representatives, Jonathan Stein and Edward Montes, of unethical practices, of misusing Ms. Taylor, and of impudent conduct.

2. On May 10, 1977, ALJ (T) Chocallo issued an opinion and order barring Ms. Taylor's representatives from any further participation in any proceedings arising from Ms. Taylor's claim and directing the claimant, *inter alia*, to obtain other representation within 30 days of the order. This order was a direct violation of section 1631 (d) (2) of the Social Security Act, as amended, and 20 CFR 416.1503, and 20 CFR 416.1540 through 416.1565, which prescribe the only method and means by which a duly authorized representative may be disqualified or suspended from acting as a representative in proceedings before the Social Security Administration.

3. On June 9, 1977, pursuant to authority contained in 20 C.F.R. 416.1459, the Appeals Council on its own motion removed to itself the request for hearing pending before ALJ (T) Chocallo in the Taylor case, vacated the order of May 10, 1977, and remanded the case to the Acting Regional Chief Administrative Law Judge in Philadelphia with instructions to assign the case, within 10 days of its order, to an administrative law judge other than Wanda P. Chocallo.

4. On June 10, 1977, at approximately 10:55 a.m., the Acting Regional Chief Administrative Law Judge (Philadelphia), in the presence of ALJ James C. Lightfoot and ALJ John W. Ennis, personally served the order of the Appeals Council on ALJ (T) Chocallo.

5. On June 13, 1977, in direct defiance of the Appeals Council order of June 9, 1977, which had removed the Taylor case from her jurisdiction, ALJ (T) Chocallo conducted a hearing on Ms. Taylor's claim.

CHARGE II

On June 10, 1977, and continuing until the present, ALJ (T) Chocallo, in the case of Pearl Taylor, Social Security Account Number 201-22-5316, has refused to comply with proper demands made upon her to relinquish and deliver files pertaining to the Taylor case after having received proper and official notice that said case had been removed from her jurisdiction.

SPECIFICATIONS

1. Specifications 1, 2, and 3 of Charge I are incorporated herein by reference and made a part hereof.

2. On June 10, 1977, at approximately 10:55 a.m., the Acting Regional Chief Administrative Law Judge (Philadelphia), in the presence of ALJ James C. Lightfoot and ALJ John W. Ennis, personally served the order of the Appeals Council on ALJ (T) Chocallo and demanded the files pertaining to Ms. Taylor's claim. ALJ (T) Chocallo refused, stating that she did not have the files in her possession. She further stated that she would not surrender the files.

3. At approximately 11:45 a.m. on June 10, 1977, by memorandum personally served on ALJ (T) Chocallo, the Acting Regional Chief Administrative Law Judge (Philadelphia) again directed her to surrender the files in accordance with the order of the Appeals Council. ALJ (T) Chocallo did not comply.

4. On June 16, 1977, Jan J. Sagett, in his capacities as both Deputy Director of the Bureau of Hearings and Appeals and as Deputy Chairman of the Appeals Council, caused to be delivered to ALJ Chocallo's office and residence written demand that she surrender any and all files pertaining to the Taylor case to Anthony J. DePhillips, the Acting Administrative Law Judge in Charge of the Philadelphia Hearing Office. There has been no response to this written directive.

CHARGE III

ALJ (T) Wanda P. Chocallo has demonstrated a lack of judicial temperament and has failed to conduct herself in an impartial and unbiased manner which has caused the Appeals Council to remand cases for new hearings because it found that claimants either were not afforded fair hearings by ALJ (T) Chocallo or that the circumstances present raised serious questions about the fairness of proceedings over which she presided.

SPECIFICATIONS

1. On March 22, 1977, in the case of Earleen Howard, Social Security Account Number 179-12-4375, the Appeals Council vacated a decision rendered by ALJ (T) Chocallo and remanded the case to another administrative law judge for a new hearing because the claimant had not been afforded a fair and impartial hearing. In its order, the Council specified that:

a. ALJ (T) Chocallo allowed specific questions and additional testimony with much reluctance and only after claimant's representative took exception and insisted upon his rights;

b. ALJ (T) Chocallo's admonishment to claimant's representative to expedite his questioning because another hearing was scheduled for the same day appeared to have deprived the representative of sufficient latitude to develop the case at the hearing.

2. On June 9, 1977, in the case of Pearl Taylor, Social Security Account Number 201-22-5316, the Appeals Council vacated an order issued by ALJ (T) Chocallo and remanded the case for hearing before another administrative law judge because, *inter alia,* the claimant had been seriously disadvantaged by ALJ (T) Chocallo's conduct. In its order, the Council stated that the excerpts from the transcript contained in the order and decision of ALJ (T) Chocallo raised serious questions about the judicial demeanor and temperament of ALJ (T) Chocallo and the manner in which she had conducted the proceedings in the case.

3. On June 15, 1977, in the case of John C. Coleman, Social Security Account Number 198-26-5344, the Appeals Council issued an order vacating a decision rendered by ALJ (T) Chocallo and remanding the case, because the claimant was not afforded a fair and proper hearing. In its decision, the Appeals Council specifically cited the following examples of improper conduct by ALJ (T) Chocallo:

a. The prolonged questioning of the claimant was conducted in a demeaning and improper fashion;

b. A verbal dispute between ALJ (T) Chocallo and claimant's attorney seriously compromised ALJ (T) Chocallo's impartiality;

c. Persistent, unnecessary interruptions of the claimant's attorney by ALJ (T) Chocallo during the course of the claimant's testimony did not permit the representative full latitude to develop the case;

d. ALJ (T) Chocallo's bias toward the claimant's attorney was reflected by exchanges during the proceedings and by characterizations of the attorney's behavior, personality, and integrity in the decision itself.

This letter of charges initiating removal proceedings is submitted for your action pursuant to 5 C.F.R. 930.221 through 930.234.

Sincerely yours,
(s) Robert L. Trachtenberg
Robert L. Trachtenberg
Director

IHA:11:PTBROWN:msk 11/17/77
Retyped—JJSAGETT:msk 6/17/77

CONSTITUTION OF THE UNITED STATES

ARTICLE I:

Section 8 provides:

"The Congress shall have power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Section 9 provides:

"No Bill of Attainder or ex post facto law shall be passed."

ARTICLE II:

Section 4 provides:

"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors."

ARTICLE VI:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. The Senators . . . and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution * * *."

AMENDMENTS TO THE CONSTITUTION

(The first 10 Amendments were ratified December 15, 1791, and form what is known as the "Bill of Rights")

AMENDMENT I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be in-

formed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

AMENDMENT VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Social Security Act

SOCIAL SECURITY ACT, Title 42 United States Code

§405. Evidence, procedure, and certification for payments—Rules and regulations; procedures

(a) The Secretary shall have full power and authority to make rules and regulations and to establish procedures, *not inconsistent with the provisions of this* subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

* * *

§405

Judicial review

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. * * *

Social Security Act

Finality of Secretary's decision

(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. *No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.* No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

Delegation of powers and duties by Secretary

(l) The Secretary is authorized to delegate to any member, officer or employee of the Department of Health, Education, and Welfare designated by him any of the powers conferred upon him by this section, and is authorized to be represented by his own attorneys in any court in any case or proceeding arising under the provisions of subsection (e) of this section.

TITLE XVI OF THE SOCIAL SECURITY ACT—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Procedural and General Provisions

Hearings and Review

Sec. 1631 (c) * * * (3) *The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 205 (g) to the same extent as the Secretary's final determinations under section 205.*

Social Security Act

§1505, Title 18 of the United States Code, 18 USC 1505:

Whoever corruptly, or by threats or force, or by any threatening letter or communications, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry or investigation or on account of his testifying or having testified to any matter pending; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of Congress—

Shall be fined not more than $5000 or imprisoned not more than five (5) years or both. (As amended Oct. 15, 1970. P.L. 91-452, Tit. IX, 903; Sept. 30, 1976, P.L. 94-435.)

CIVIL SERVICE COMMISSION REGULATIONS—

5 Code of Federal Regulations

§930.201 Coverage.

(a) This subpart applies to persons appointed under section 3105 of title 5, United States Code, for proceedings required to be conducted in accordance with section 556 and 557 of that title, and to administrative law judge positions.

(b) • • •

§930.202 Definitions.

In this subpart:

(a) *"Agency"* has the meaning given it by section 551 of title 5, United States Code.

§930.203 Appointment.

(b) Prior approval. An agency may make an appointment to an administrative law judge position only with the prior approval of the Commission . . ."

§930.204 Promotion.

When the Commission classifies an occupied administrative law judge position at a higher grade, the Commission shall direct the promotion of the incumbent administrative law judge and the promotion is effective on the date named by the Commission.

§930.209 Detail and assignment to other duties.

(a) An agency may not detail an employee who is not an administrative law judge to an administrative law judge position.

§930.210 Pay.

(b) An administrative law judge is entitled to within-grade increases in accordance with Part 531 of this chapter, except that the requirement that his work be of an acceptable level of competence as determined by the head of his agency does not apply.

§930.211 Performance rating.

An agency shall not rate the performance of an administrative law judge.

§930.212 Rotation of judges.

Insofar as practicable, an agency shall assign its administrative law judges in rotation to cases.

§930.214 Separation.

(a) *Removal.* An agency may remove an administrative law judge only for good cause, established and determined by the Commission, after opportunity for a hearing and on the record thereof as provided in §§930.221 through 930.234.

Hearings in Removal Cases: Rules of Practice

§930.221 Letter of charges.

An *agency* shall initiate removal proceedings against an administrative law judge by filing with the General Counsel of the Commission a letter of charges (original and four copies) which shall set forth specifically and in detail the reasons that are alleged to constitute good cause for the administrative law judge's removal.

* * *

ADMINISTRATIVE PROCEDURE ACT

Title 5, United States Code

§551. Definitions

For the purpose of this subchapter—

(1) *"agency"* means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the government of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

§554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

* * *

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

* * *

(d) *The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the*

recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of *ex parte* matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) *be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.*

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

* * *

§559 Effect on other laws; effect of subsequent statute

"* * * Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301 (2) (E), 5362, or *7521*

of this title, or the provisions of section 5335(a) (B) of this title, that relate to hearing examiners, *except to the extent* that it does so expressly."

§706. Scope of review [In effect at time of these proceedings]

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§3105. Appointment of Hearing Examiners [Administrative law judges]

Each agency shall appoint as many hearing examiners as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Hearing examiners shall be assigned to cases in rotation so far as practicable and may not perform duties inconsistent with their duties and responsibilities.

§5362. Pay Rates

Hearing examiners appointed under section 3105 of this title are entitled to pay prescribed by the Civil Service Commission independently of agency recommendations or ratings and in accordance with subchapter III of this chapter. . . .

§7521. Removal

A hearing examiner appointed under section 3105 of this title may be removed by *the agency* which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing.

REGULATIONS OF THE SECRETARY—

20 Code of Federal Regulations

* * *

§404.947a. Basis for review of the presiding officer's decision or dismissal by Appeals Council.

(a) The Appeals Council, on its own motion or on request for review, will review a hearing decision or dismissal where:

(1) There appears to be an abuse of discretion by the presiding officer;

(2) There is an error of law;

(3) The presiding officer's action, findings, or conclusions are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue which may affect the general public interest.

(b) Where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the presiding officer's action, findings, or conclusion is contrary to the weight of the evidence currently of record. [41 FR 51588, *Nov. 23, 1976*]